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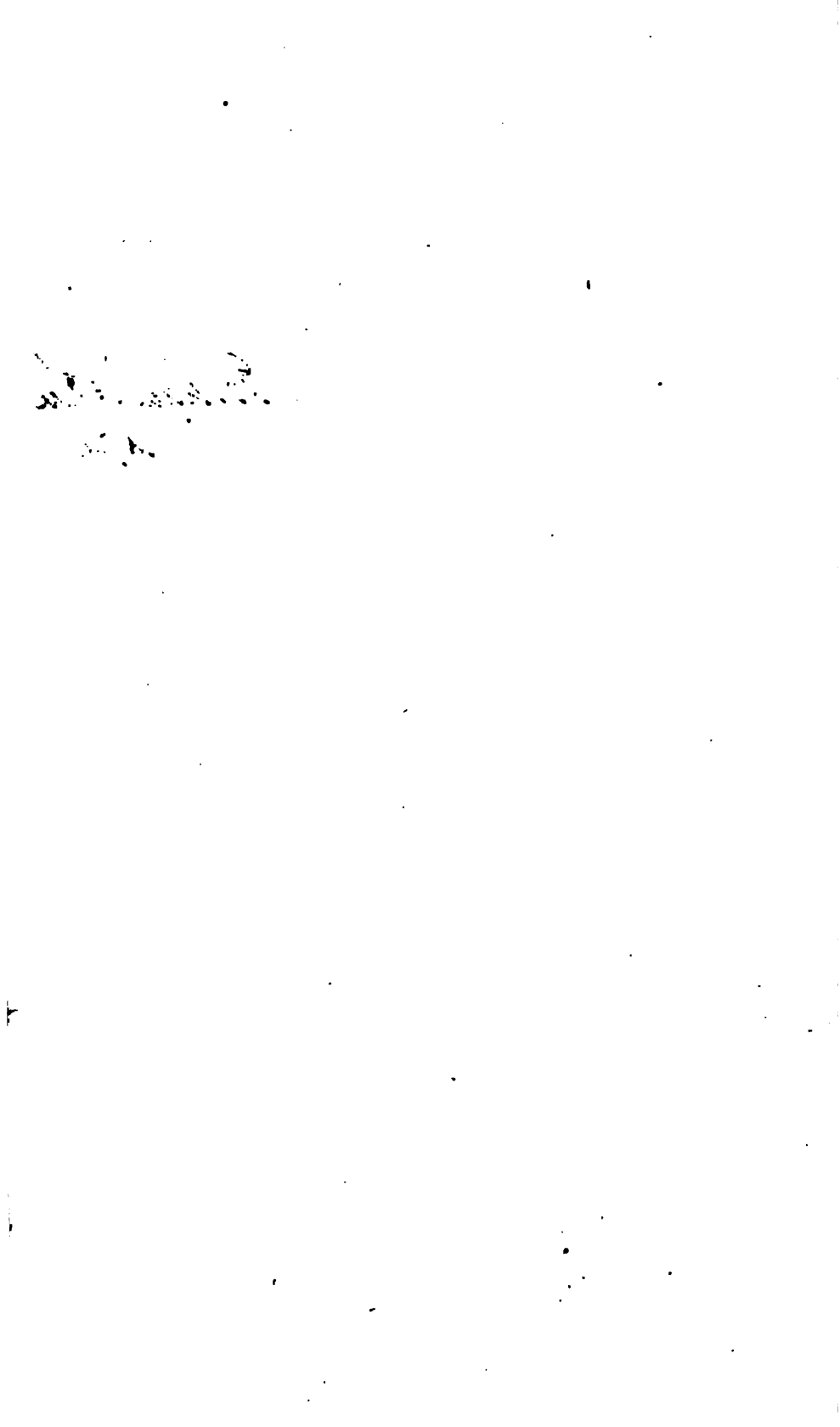




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A TREATISE

ON THE

Validity of Verbal Agreements,

AS AFFECTED BY THE LEGISLATIVE ENACTMENTS

IN ENGLAND AND THE UNITED STATES,

COMMONLY CALLED

THE STATUTE OF FRAUDS;

INCLUDING, ALSO, THE EFFECT OF PARTIAL AND COMPLETE PERFORMANCE, AND
THE SUFFICIENCY OF THE WRITING, IN CASES WHERE VERBAL
AGREEMENTS ARE NOT VALID;

TOGETHER WITH OTHER KINDRED MATTERS; TO WHICH ARE PREFIXED TRANS-
SCRIPTS OF THE VARIOUS STATUTES ON THE SUBJECT, NOW IN
FORCE IN BOTH COUNTRIES.

BY MONTGOMERY H. THROOP.

IN TWO VOLUMES.

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PREFACE.

The uncertainty and confusion, which, after the lapse of nearly two centuries, still obscure most questions pertaining to the application of the statute of frauds to executory agreements, have long been a reproach to our system of jurisprudence, a stumbling block to the student, and a source of painful embarrassment to all persons charged with the administration of justice. In the following pages I have endeavored to reduce the discordant mass of doctrine and authority upon this branch of the law, to an orderly and harmonious system. The difficulties attending this undertaking are well known to all who have studied the subject; and although I cannot expect complete success, I hope for the good will of the profession towards my effort to accomplish an object so desirable, and its kindly indulgence wherever I may have failed. And I cherish with considerable confidence the belief, that this work, regarded merely as a collation of cases and principles, many of which are imperfectly understood, and inaccessible without much toil, will tend materially to lighten the labors of my professional brethren in similar investigations, and to smooth the path of the student; even if the methods which I have freely, (perhaps sometimes presumptuously,) suggested, of reconciling cases supposed to be conflicting, and of terminating the conflict of authority when they could not be reconciled, shall fail to command general approbation.

The nature of my task has often required more elaborate discussions of principles, more minute examinations of the peculiar features of the adjudged cases, and more extended comments upon them, than would be necessary or proper, in writing upon subjects where the governing rules are more settled, and the authorities more harmonious. For this reason, and particularly in conse-

quence of the manner in which I have cited leading and representative cases, I have found it impossible to complete this treatise in one volume, as I had originally proposed. But, unless I misapprehend the preferences of the profession, few will complain of an increase of bulk, caused by accurate condensations of judiciously selected authorities. The number of the volumes of the reports, to which an American lawyer is now referred by the digests, is so great, that a personal examination of all the adjudications, upon any obscure and controverted point of law, can rarely be made, except in a public library; and access to such an institution can be obtained by many of the profession only at intervals, while it is attended with great delays and inconveniences, even to those who can command it at pleasure. The plan, which has been adopted by some of the most popular legal authors, of giving abstracts, more or less extended, of the principal cases cited, although but a partial remedy for this evil, is the only one of which it admits. And I have therefore used such abstracts freely, in order to elucidate the practical operation of settled principles; to point out the distinctions in their application; to show the arguments and authorities upon each side of unsettled questions; to fortify my own conclusions; and generally to illustrate the current discussion. No pains have been spared to overcome the difficulty, inseparable from the necessary condensation, of making them faithful exponents of the reported cases. And although nothing can entirely supply the place of the reports themselves, it is believed that these abstracts will greatly assist the ready understanding of the text, and answer many useful purposes, not only in the "occasions sudden" of professional practice, but also in the deliberate preparation of causes for trial or argument.

In condensing the English decisions, I have consulted all the different reports of the same case, (frequently five or six in number,) selecting in each instance the most satisfactory version, and sometimes gathering the points of the case from more than one report. The book from which the condensation was made, is

always mentioned in immediate connection with the title of the case; and when several books were used for the purpose, all are similarly cited. The parallel reports are referred to in the foot notes; or, when the principal citation is in a foot note, they are inserted in brackets.

There is a very close connection, in many instances, between questions relating to the sufficiency of certain agreements under the statute of frauds, and questions affecting their validity at common law, or the right to enforce them in equity. This connection has frequently led to confusion; but even where the dividing line has been preserved, or after it has been pointed out, a rigid restriction of the discussion to the questions arising under the statute, would often leave the examination of the subject incomplete, and its result unsatisfactory. For this reason many common law and equitable doctrines, pertaining to the general law of contracts, have been incidentally considered in the course of these pages, sometimes at considerable length; the discussion having been thrown into a foot note, whenever it threatened to encroach too much upon the space and attention, to which the principal subject was justly entitled to lay claim.

M. H. T

NEW YORK, *July*, 1870.

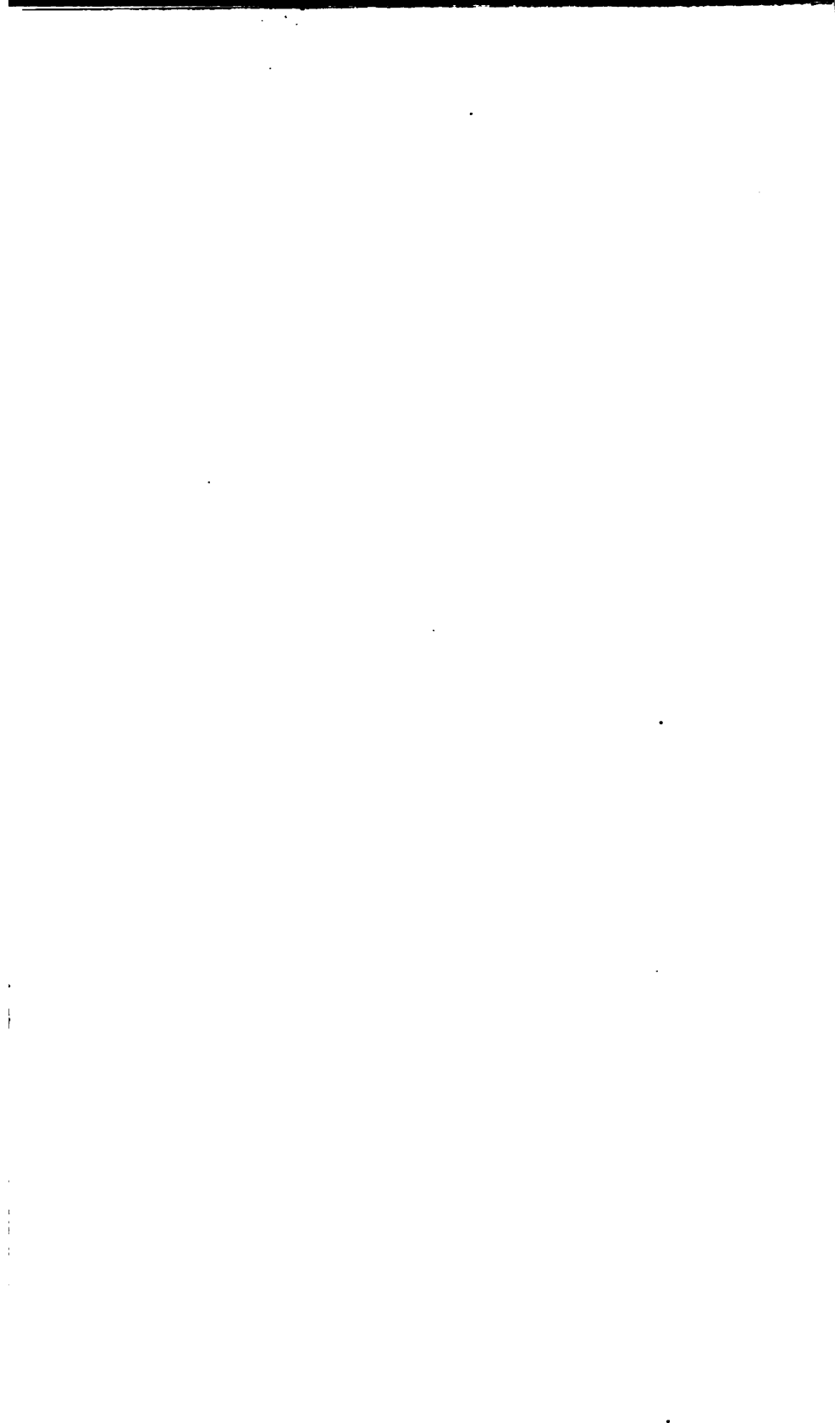


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STATUTES

RELATING TO

THE SUBJECT OF THIS WORK.

[The original statute of frauds is given at length; but the subsequent amendments, and the extracts from statutes enacted in the United States, are confined to such as relate to the matter of the fourth and the seventeenth sections, except where other matters are also provided for in one section. All the enactments relative to verbal representations respecting the credit, &c., of another, are given; yet they may be regarded as amendments to the fourth section; having been passed in consequence of decisions that it did not apply to such representations.]

“THE STATUTE OF FRAUDS.”

29 CAR. II. (A. D. 1677.)

CHAPTER III.

Stat. Part. 29
c. 11, p. 1, sec. 1.

AN ACT for prevention of Frauds and Perjuries.

For prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury Bee it enacted by the Kings most excellent Majestie by and with the advice and consent of the Lords Spirituall and Temporall and the Commons in this present Parlyament assembled and by the authoritie of the same That from and after the fower and twentyeth day of June which shall be in the yeare of our Lord one thousand six hundred seaventy and seaven All Leases Estates Interests of Freehold or Termes of yeares or any uncertaine Interest of in to or out of any Messuages Mannours Lands Tenements or Hereditaments made or created by Livery and Seisin onely or by Parole and not putt in Writeing and signed by the parties soe making

or creating the same or their Agents thereunto lawfully authorized by Writeing, shall have the force and effect of Leases or Estates at Will onely and shall not either in Law or Equity be deemed or taken to have any other or greater force or effect, Any consideration for makeing any such Parole Leases or Estates or any former Law or Usage to the contrary notwithstanding.

II. EXCEPT nevertheless all Leases not exceeding
[Sec. 2.] the terme of three yeares from the makeing thereof whereupon the Rent reserved to the Landlord during such terme shall amount unto two third parts at the least of the full improved value of the thing demised.

III. AND moreover That noe Leases Estates or Interests either of Freehold or Terms of yeares or any
[Sec. 3.] uncertaine Interest not being Copyhold or Customary Interest of in to or out of any Messuages Mannours Lands Tenements or Hereditaments shall at any time after the said fower and twentyeth day of June be assigned granted or surrendred unlesse it be by Deed or Note in Writeing signed by the party soe assigning granting or surrendring the same or their Agents thereunto lawfully authorized by writeing or by act and operation of Law.

IV. AND bee it further enacted by the authoritie aforesaid That from and after the said fower and
[Sec. 4.] twentyeth day of June noe Action shall be brought whereby to charge any Executor or Administrator upon any speciall promise to answer damages out of his owne Estate [2] or whereby to charge the Defendant upon any speciall promise to answer for the debt default or miscarriages of another person [3] or to charge any person upon any agreement made upon consideration of Marriage [4] or upon any Contract or Sale of Lands Tenements or Hereditaments or any Interest in or concerning them [5] or upon any Agreement that is not to be performed within the space of one yeare from the makeing thereof [6] unlesse

the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized.

V. AND bee it further enacted by the authoritie aforesaid That from and after the said fower and [Sec. 5.] twentyeth day of June all Devises and Bequests of any Lands or Tenements deviseable either by force of the Statute of Wills or by this Statute or by force of the Custome of Kent or the Custome of any Burrough or any other perticular Custome shall be in Writeing and signed by the partie soe deviseing the same or by some other person in his presence and by his expresse directions and shall be attested and subscribed in the presence of the said Devisor by three or fower credible Witnesses or else they shall be utterly void and of none effect.

VI. AND moreover noe Devise in Writeing of Lands Tenements or Hereditaments nor any Clause [Sec. 6.] thereof shall at any time after the said fower and twentyeth day of June be revocable otherwise than by some other Will or Coddicill in Writeing or other Writeing declareing the same or by burning cancelling teareing or obliterating the same by the Testator himselfe or in his presence and by his directions and consent [2] but all Devises and Bequests of Lands and Tenements shall remaine and continue in force until the same be burnt cancelled torne or obliterated by the Testator or his directions in manner aforesaid or unlesse the same be altered by some other Will or Codicill in Writeing or other Writeing of the Devisor signed in the presence of three or fower Witnesses declareing the same, Any former Law or Usage to the contrary notwithstanding.

VII. AND bee it further enacted by the authoritie aforesaid That from and after the said fower and [Sec. 7.] twentyeth day of June Declarations or Creations of Trusts or Confidences of any Lands Tenements or

Hereditaments shall be manifested and proved by some Writeing signed by the partie who is by Law enabled to declare such Trust or by his last Will in Writeing or else they shall be utterly void and of none effect.

VIII. PROVIDED alwayes That where any Conveyance shall bee made of any Lands or Tenements by [Sec. 8.] which a Trust or Confidence shall or may arise or result by the Implication or Construction of Law or bee transferred or extinguished by an act or operation of Law then and in every such Case such Trust or Confidence shall be of the like force and effect as the same would have beene if this Statute had not beene made. Anything hereinbefore contained to the contrary notwithstanding.

IX. AND bee it further enacted That all Grants and Assignments of any Trust or Confidence shall [Sec. 9.] likewise be in Writeing signed by the party granting or assigning the same [or¹] by such last Will or Devise or else shall likewise be utterly void and of none effect.

X. AND bee it further enacted by the authoritie [Sec. 10.] aforesaid That from and after the said fower and twentyeth day of June it shall and may be lawfull for every Sheriffe or other Officer to whome any Writt or Precept is or shall be directed at the Suite of any person or persons of for and upon any Judgement Statute or Recognizance hereafter to be made or had, to doe make and deliver Execution unto the partie in that behalfe sueing of all such Lands Tenements Rectories Tythes Rents and Hereditaments as any other person or persons be in any manner of wise seised or possessed [or hereafter shall be seised or possessed¹] in Trust for him against whome Execution is soe sued like as the Sheriffe or other Officer might or ought to have done if the said partie against whome Execution hereafter shall be soe sued had beene seised of

¹ interlined on the Roll.

such Lands Tenements Rectories Tythes Rents or other Hereditaments of such Estate as they be seised of in trust for him at the time of the said Execution sued. [2] Which Lands Tenements Rectories Tythes Rents and other Hereditaments by force and vertue of such Execution shall accordingly be held and enjoyed freed and discharged from all Incumbrances of such person or persons as shall be soe seised or possessed in Trust for the person against whome such execution shall be sued. [3] And if any Cestuy que Trust hereafter shall dye leaveing a Trust in Fee simple to descend to his Heire, there, and in every such case such Trust shall be deemed and taken and is hereby declared to be Assetts by descent and the Heir shall be lyable to and chargeable with the Obligation of his Auncestors for and by reason such Assetts as fully and amply as he might or ought to have beene if the Estate in Law had descended to him in possession in like manner as the Trust descended, Any Law Custome or Usage to the contrary in any wise notwithstanding.

XI. PROVIDED alwayes That noe Heire that shall [Sec. 11.] become chargeable by reason of any Estate or Trust made Assetts in his hands by this Law shall by reason of any kinde of Plea or confession of the Action or suffering Judgement by Nient dedire or any other matter bee chargeable to pay the Condemnation out of his owne Estate [2] but Execution shall be sued of the whole Estate soe made Assetts in his hands by descent in whose hands soever it shall come after the Writt purchased in the same manner as it is to be at and by the Common Law where the Heire at Law pleading a true Plea Judgement is prayed against him thereupon. Any thing in this present Act contained to the contrary notwithstanding.

XII. AND for the amendment of the law in the particulars following [2] Bee it further enacted by [Sec. 12.] the authoritie aforesaid That from henceforth any Estate per auter vie shall be deviseable by a Will in

writing signed by the party soe deviseing the same or by some other person in his presence and by his expresse directions attested and subscribed in the presence of the Devisor by three or more Witnesses, [3] and if noe such Devise thereof be made the same shall be chargeable in the hands of the Heire if it shall come to him by reason of a speciall Occupancy as Assetts by descent as in case of Lands in Fee simple [4] And in case there be. noe speciall Occupant thereof it shall goe to the Executors or Administrators of the partie that had the Estate thereof by vertue of the Grant and shall be Assetts in their hands.

XIII. AND whereas it hath beene found mischievous [Sec. 13.] that Judgements in the Kings Courts at Westminster doe many times relate to the first day of the Terme whereof they are entred or to the day of the Returne of the Originall or fileing the Baile and binde the Defendants Lands from that time although in trueth they were acknowledged or suffered and signed in the Vacation time after the said Terme whereby many times Purchasers finde themselves agrieved [Sec. 14.] Bee it enacted by the authoritie aforesaid That from and after the said foure and twentyeth day of June any Judge or Officer of any of his Majestyes Courts of Westminster that shall signe any Judgements shall at the signeing of the same without Fee for doeing the same sett downe the day of the moneth and yeare of his soe doeing upon the Paper Booke Dockett or Record which he shall signe which day of the moneth and yeare shall be alsoe entred upon the Margent of the Roll of the Record where the said Judgement shall be entred.

XIV. AND bee it enacted That such Judgements as [Sec. 15.] against Purchasers bona fide for valueable consideration of Lands Tenements or Hereditaments to be charged thereby shall in consideration of Law be Judgements onely from such time as they shall be soe signed and shall not relate to the first day of the Terme whereof they are entred or the day of the Returne of the

Originall or filing the Baile Any Law, Usage or Course of any Court to the contrary notwithstanding.

XV. AND bee it further enacted by the authoritie
[Sec. 16.] aforesaid That from and after the said fower and
twentyeth day of June noe Writt of Fieri facias
or other Writt of Execution shall binde the Property of
the Goods against whome such Writt of Execution is sued
forth but from the time that such Writt shall be delivered
to the Sheriffe Under Sheriffe or Coroners to be executed,
And for the better manifestation of the said time the
Sheriffe Under-Sheriffe and Coroners their Deputyes and
Agents shall upon the receipt of any such Writt (without
Fee for doeing the same) endorse upon the backe thereof
the day of the moneth [or¹] yeare whereon he or they
received the same.

XVI. AND bee it further enacted by the authority
[Sec. 17.] aforesaid That from and after the said fower
and twentyeth day of June noe Contract for
the Sale of any Goods Wares or Merchandises for the
price of ten pounds Sterling or upwards shall be allowed
to be good except the Buyer shall accept part of the
Goods soe sold and actually receive the same or give
something in earnest to bind the bargain or in part of
payment, or that some Note or Memorandum in writeing
of the said bargain be made and signed by the partyes
to be charged by such Contract or their Agents thereunto
lawfully authorized.

XVII. AND bee it further enacted by the authority
[Sec. 18.] aforesaid That the day of the moneth and
yeare of the Enrollment of the Recognizances
shall be sett downe in the Margent of the Roll where the
said Recognizances are enrolled, and that from and after
the said fower and twentyeth day of June noe Recogni-
zance shall binde any Lands Tenements or Heredita-

¹ "and" O. (omitted.)

ments in the hands of any Purchasor bona fide and for valueable consideration but from the time of such Enrolment, Any Law Usage or Course of any Court to the contrary in any wise notwithstanding.

XVIII. AND for prevention of fraudulent Practices in setting up Nuncupative Wills which [Sec. 19.] have beene the occasion of much Perjury [2] Bee it enacted by the authority aforesaid That from and after the aforesaid fower and twentyeth day of June noe Nuncupative Will shall be good where the Estate thereby bequeathed shall exceede the value of thirty pounds that is not proved by the Oathes of three Witnesses (at the least) that were present at the makeing thereof, [3] nor unlesse it be proved that the Testator at the time of pronouncing the same did bid the persons present or some of them beare wittnesse that such was his Will or to that effect, [4] nor unlesse such Nuncupative Will were made in the time of the last sicknesse of the deceased and in the House of his or her habitation or dwelling or where he or she hath beene resident for the space of ten dayes or more next before the makeing of such Will except where such person was surprized or taken sick being from his owne home and dyed before he returned to the place of his or her dwelling.

XIX. AND bee it further enacted That after six monethes passed after the speaking of the [Sec. 20.] pretended Testamentary words noe Testimony shall be received to prove any Will Nuncupative except the said Testimony or the substance thereof were committed to writeing within six dayes after the makeing of the said Will.

XX. AND bee it further enacted That noe Letters Testamentary or Probate of any Nuncupative [Sec. 21.] Will shall passe the Seale of any Court till fowerteene dayes at the least after the decease of the Testator be fully expired, [2] Nor shall any Nuncupative

Will be at any time received to be proved unlesse Proccesse have first issued to call in the Widow or next of kindred to the deceased to the end they may contest the same if they please.

XXI. AND bee it further enacted That noe Will in
[Sec. 22.] writeing concerning any Goods or Chattells or Personall Estate shall be repealed nor shall any Clause Devise or Bequest therein. be altered or changed by any Words or Will by word of mouth onely except the same be in the life of the Testator committed to writeing and after the writeing thereof read unto the Testator and allowed by him and proved to be soe done by three Wittnesses at the least.

XXII. PROVIDED alwayes That notwithstanding this
[Sec. 23.] Act any Soldier being in actuall Military Service or any Marriner or Seaman being at Sea may dispose of his Moveables, Wages and Personall Estate as he or they might have done before the makeing of this Act.

XXIII. AND it is hereby declared That nothing in
[Sec. 24.] this Act shall extend to alter or change the Jurisdiction or Right of Probate of Wills concerning Personall Estates but that the Prerogative Court of the Archbishop of Canterbury and other Ecclesiasticall Courts and other Courts haveing Right to the Probate of such Wills shall retaine the same Right and Power as they had before in every respect subject neverthelesse to the Rules and Directions of this Act.

XXIV. AND for the explaining one Act of this
[Sec. 25.] present Parlyament intituled An Act for the better settleing of Intestates Estates Bee it declared by the authority aforesaid That neither the said Act nor any thing therein contained shall be construed to extend to the Estates of Feme-Coverts that shall dye Intestate, but that their Husbands may demand and have

Administration of their Rights Credits and other Personall Estates and recover and enjoy the same as they might have done before the making of the said Act.¹

¹ The foregoing is an exact transcript of the text of the statute, with the orthography and punctuation of the original preserved, as contained on pages 839, 840, 841 and 842 of the fifth volume of the "Statutes of the Realm," folio, published in London in the year 1819, "printed by command of His Majesty, King George the Third, in pursuance of an address of the House of Commons of Great Britain." In the printed volume the Roman numerals, designating the sections, are contained in the outer margin, and under each is a short sentence, containing an abstract of the contents of each section so designated. We have omitted these sentences, and added in brackets the numbers of the sections, as we find them in the unauthorized editions of the English statutes, and in the copies of the statute of frauds, contained in various text-books; and we have also designated the different clauses of several sections by Arabic numerals in brackets, to make them correspond with similar divisions in those editions. In all these respects the unauthorized editions of the statute are exactly alike; and the different sections are cited according to this numeration in the text-books and reported cases; but it will be noticed that the thirteenth section, according to the official copy, is divided by the unauthorized publications into two sections, in consequence of which the numbers of the subsequent sections do not correspond with those of the official edition; the seventeenth section, of which we shall treat largely in the second volume, being in reality the sixteenth of the official copy. Doubtless this distribution of the statute into sections was made in some copy published shortly after it was passed, which has been followed ever since; but we are not able to trace its origin. The cases decided soon after the passage of the statute of frauds, generally refer to its clauses by stating their substance, without reference to the numbers of the sections; and the earliest case which we have noticed where any section subsequent to the twelfth is referred to by its number, is *Colt vs. Nettetvill*, 2 Peere Williams, 305, A. D. 1725, which speaks of the seventeenth section, meaning thereby the one known to us by that number. The South Carolina provincial statute of 1712, mentioned hereafter as the enactment whereby the statute of frauds is now in force in that State, adopts "the several statutes, and the several paragraphs, and sections or numbers of the paragrapns of the several statutes of the Kingdom of England," thereafter contained in the enactment, "as the same are distinguished and divided into paragraphs and sections or numbers, by Joseph Keble, of Gray's Inn, Esq., in his statutes at large from Magna Charta to the end of the reign of King Charles the 2d," and the statute of 29 Charles 2d, chapter 3, is inserted at length, with the sections numbered and divided into paragraphs, as is now customary. It is quits probable that the present numeration derives its origin from that book.

EXTRACTS FROM

“LORD TENTERDEN’S ACT.”

[9 Geo. 4, chap. 14. May 9, 1828.]

“An Act for rendering a written memorandum necessary to the validity of certain promises and engagements.”

Sec. 6. That no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon,¹ unless such representation or assurance be made in writing, signed by the party to be charged therewith.

Sec. 7. And whereas by an Act passed in England in the twenty-ninth year of the reign of king Charles the second, intituled “An Act for the Prevention of Frauds and Perjuries,” it is among other things enacted, that from and after the 24th day of June, 1677, no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised; And whereas a similar enactment is contained in an Act passed in Ireland in the seventh year

¹ So on the original roll of parliament: probably a mistake for ‘thereupon.’ See the observations of Parke B. and Lord Abinger, C. B., *Lyde vs. Barnard*, 1 M. & W. 115. *Note to Chitty’s Statutes.*

of the reign of king William the third : And whereas it has been held, that the said recited enactments do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied ; and it is expedient to extend the said enactments to such executory contracts ; BE IT ENACTED, That the said enactment shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

Sec. 8. That no memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps.

Sec. 9. That nothing in this Act contained shall extend to Scotland.

EXTRACTS FROM

"THE MERCANTILE LAW AMENDMENT ACT."

[19 and 20 Vict., chap. 97. July 29, 1856.]

"An Act to amend the Laws of England and Ireland affecting Trade and Commerce."

Sec. 3. No special promise to be made by any person after the passing of this Act to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding, to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

Sec. 4. No promise to answer for the debt, default or miscarriage of another, made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties, that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise.

Sec. 13. In reference to the provisions of the Acts of the ninth year of the reign of King George the fourth, chapter

fourteen, sections one and eight, and the sixteenth and seventeenth years of the reign of her present majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

AMERICAN STATUTES.

ALABAMA.

Revised Code of 1867. Part 2, Title 3, chapter 4.

Sec. 1862. In the following cases, every agreement is void, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith or some other person by him thereunto lawfully authorized in writing.

1. Every agreement, which, by its terms, is not to be performed within one year from the making thereof.

2. Every special promise, by an executor or administrator, to answer damages out of his own estate.

3. Every special promise to answer for the debt, default, or miscarriage of another.

4. Every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry.

5. [Related to agreements for the sale of goods, &c., exceeding \$200; repealed Nov. 7, 1862.]

6. Every contract for the sale of lands, tenements, or hereditaments, or of any interest therein, except leases for a term not longer than one year, unless the purchase money, or a portion thereof, be paid, and the purchaser be put into possession of the land by the seller.

Sec. 1863. When goods, or things in action are sold, or lands, tenements, or hereditaments sold or leased at public auction, and the auctioneer, his clerk, or agent, makes a memorandum of the property, and price thereof at which it is sold or leased, the terms of sale, the name of the purchaser or lessee, and the name of the person on whose account the sale or lease is made, such memorandum is a note of the contract within the meaning of the preceding section.

Sec. 1864. No action can be maintained to charge any person, by reason of any representation or assurance made, concerning

the character, conduct, ability, trade or dealings of any other person, when such action is brought by the person to whom such representation or assurance was made, unless the same is in writing, signed by the party sought to be charged.

ARKANSAS.

Gould's Digest, 1858. Chapter 74.

Sec. 1. No action shall be brought, first, to charge any executor or administrator, upon any special promise, to answer for any debt or damage out of his own estate; second, to charge any person upon any special promise to answer for the debt, default, or mis-carriage of another; third, to charge any person upon an agree-ment made in consideration of marriage; fourth, to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; fifth, to charge any person upon any lease of lands, tenements, or hereditaments, for a longer term than one year; sixth, to charge any person, upon any contract, promise, or agreement, that is not to be performed within one year from the making thereof; unless the agreement, promise, or contract, upon which such action shall be brought, or some memorandum or note thereof shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized.

Sec. 2. No contract for the sale of goods, wares, and merchan-dise, for the price of thirty dollars, or upwards, shall be binding on the parties, unless first, there be some note or memorandum signed by the party to be charged; or, second, the purchaser shall accept part of the goods so sold, and actually receive the same; or, third, shall give something in earnest to bind the bargain, or in part payment thereof.

CALIFORNIA.

Hittel's General Laws, 1885. [Act of April 19, 1850.]

3152. Every contract for the leasing for a longer period than one year or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party to whom the lease or sale is to be made.

3153. Every instrument required to be subscribed by any person, under the last preceding section, may be subscribed by the agent of such party, lawfully authorized.

3154. Nothing contained in this chapter shall be construed to abridge the powers of courts to compel the specific performance of agreements, in cases of part performance of such agreements.

3156. In the following cases, every agreement shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party charged therewith : first, every agreement that by the terms is not to be performed within one year from the making thereof; second, every special promise to answer for the debt, default, or miscarriage of another; third, every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry.

3157. Every contract for the sale of any goods, chattels, or things in action, for the price of two hundred dollars or over, shall be void, unless, first, a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or, second, unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or, third, unless the buyer shall at the time pay some part of the purchase-money.

3158. Whenever any goods shall be sold at auction, and the auctioneer shall, at the time of sale, enter in a sale-book a memorandum, specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser and the name of the person on whose account the sale is made; such memorandum shall be deemed a note of the contract of sale within the meaning of the last section.

3163. Every instrument required by any of the provisions of this chapter to be subscribed by any party may be subscribed by the lawful agent of such party.

[Act of May 1, 1851.]

5913. No executor or administrator shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing, and signed by such executor or administrator, or by some other person by him thereunto specially authorized.

CONNECTICUT.

General Statutes, 1866. Title 25.

Sec. 1. That for the prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury, and subornation of perjury, no suit in law or equity shall be brought or maintained upon any contract or agreement, whereby to charge any executor or administrator, upon special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise, to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the contract of agreement upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized, but all parol contracts or agreements, made for the hiring or leasing of any lands or tenements or of any interest therein, for the term of only one year, or for any less time than one year, in pursuance of which the leased premises have been, or shall be, actually occupied by the lessee, or by any person claiming under him, during any portion of the period covered by such contract or agreement shall be as valid and effectual as if the same were in writing, and signed by the parties thereto, and nothing herein shall be so construed as to prevent an action being brought or sustained thereon.

Sec. 2. No contract for the sale of any goods, wares, or merchandise, for the price of thirty-five dollars or upwards, shall be allowed to be good, unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum, in writing, of the said bargain, shall be made and signed by the parties to be charged by such contract, or by their agents, thereunto lawfully authorized.

DELAWARE.

Revised Statutes of 1853. Chapter 63.

Sec. 5. All promises and assumptions, whereby any person shall undertake to answer or pay for the default, debt, or miscarriage of another, any sum under five dollars, being proved by the oath or affirmation of the persons to whom such promise and assumption shall be made, are good and available in law to charge the party making such promise or assumption.

Sec. 6. No action shall be brought, whereby to charge any executor or administrator, upon any special promise to answer damages out of his own estate, or whereby to charge any defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person, of the value of five dollars, and not exceeding twenty dollars, unless such promise and assumption shall be proved by the oath, or affirmation, of one credible witness, or some memorandum, or note in writing, shall be signed by the party to be charged therewith.

Sec. 7. No action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, or to charge any person whereby to answer for the debt, default, or miscarriage, of another, in any sum of the value of twenty-five dollars and upwards, unless the same shall be reduced to writing, or some memorandum or note thereof shall be signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized; except for goods, wares, and merchandise sold and delivered, and other matters which are properly chargeable in an account, in which case the oath or affirmation of the plaintiff, together with a book regularly and fairly kept, shall be allowed to be given in evidence, in order to charge the defendant with the sums therein contained.

FLORIDA.

Thompson's Digest, 1847. Second Division. Title 4, chap. 3, page 217.

Sec. 1. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer, or pay any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands, tenements, or hereditaments, or of any uncertain interest in, or concerning them, or for any lease thereof for a longer term than one year, or upon any agreement that is not to be performed within one year from the making thereof, unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized.

Sec. 2. No contract for the sale of any personal property, goods, wares, or merchandise, shall be good, unless the buyer shall accept the goods or part of them so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the said bargain or contract be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

GEORGIA.

Irwin's Code, 1867. (Adopted 1860.)

Sec. 1940. To make the following obligations binding on the promiser the promise must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized, viz.:

1. A promise by an executor, administrator, guardian, or trustee to answer damages out of his own estate.

2. A promise to answer for the debt, default, or miscarriage of another.

3. Any agreement made upon consideration of marriage, except marriage articles as herein before provided.

4. Any contract for sale of lands, or any interest in; or concerning them.

5. Any agreement (except contracts with overseers) that is not to be performed within one year from the making thereof.

6. Any promise to revive a debt barred by the acts of limitation.

7. Any contract for the sale of goods, wares, and merchandise in existence, or not in esse, to the amount of fifty dollars or more, except the buyer shall accept part of the goods sold and actually receive the same, or give something in earnest to bind the bargain; or in part payment.

Sec. 1941. The foregoing section does not extend to the following cases viz.:

1. When the contract has been fully executed.

2. Where there has been performance on one side, accepted by the other in accordance with the contract.

3. Where there has been such part performance of the contract as would render it a fraud of the party refusing to comply if the Court did not compel a performance.

ILLINOIS.

Scates, Treat and Blackwell's Statutes, 1858. Vol. 1, pp. 541, 542.

[From R. S., 1845, ch. 44.]

Sec. 1. No action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer any debt or damages out of his own estate, or whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; for a longer term than one year; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

INDIANA.

Gavin and Hord's edition of the Statutes, 1863. Vol. 1, pp. 848, 351.

[Act of June 9, 1853.]

Sec. 1. No action shall be brought in any of the following cases:

1. To charge an executor or administrator, upon any special promise, to answer damages out of his own estate; or,
2. To charge any person, upon any special promise, to answer for the debt, default or miscarriage of another; or,
3. To charge any person, upon any agreement or promise made in consideration of marriage; or,
4. Upon any contract for the sale of lands; or,
5. Upon any agreement that is not to be performed within one year from the making thereof; unless the promise, contract or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized; excepting, however, leases not exceeding the term of three years.

Sec. 2. The consideration of any such promise, contract, or agreement, need not be set forth in such writing, but may be proved.

Sec. 5. Nothing contained in any statute of this state shall be construed to abridge the powers of courts to compel the specific performance of agreements in cases of part performance of such agreements.

Sec. 6. No action shall be maintained, to charge any person by reason of any representation made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him legally authorized.

Sec. 7. No contract for the sale of any goods for the price of fifty dollars or more shall be valid, unless the purchaser shall receive part of such property, or shall give something in earnest

to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

IOWA.

Revision of 1860.

Sec. 1824. All contracts in writing hereafter made and signed by the party to be bound or his authorized agent or attorney shall import a consideration in the same manner as sealed instruments now do.

Sec. 4006. Except when otherwise specially provided, no evidence of any of the contracts enumerated in the next succeeding section is competent, unless it be in writing, and signed by the party charged or by his lawfully authorized agent.

Sec. 4007. Such contracts embrace:

1. Those in relation to the sale of personal property, when no part of the property is delivered, and no part of the price is paid.
2. Those made in consideration of marriage, but not including promises to marry.
3. Those wherein one person promises to answer for the debt, default or miscarriage of another, including promises by executors to pay the debt of their principals from their own estate.
4. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year.
5. Those that are not to be performed within one year from the making thereof.

Sec. 4008. The provision of the first subdivision of the preceding section does not apply when the article of personal property sold is not at the time of the contract owned by the vendor and ready for delivery, but labor, skill, or money are necessarily to be expended in producing or procuring the same; nor do those of the fourth subdivision of said section apply where the purchase-money or any portion thereof has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof under and by virtue of the contract, or when there is any other circumstance

which by the law heretofore in force would have taken a case out of the Statute of Frauds.

Sec. 4009. The above regulations, relating merely to the proof of contracts, do not prevent the enforcement of those which are not denied in the pleadings, unless in cases where the contract is sought to be enforced, or damages to be recovered for the breach thereof, against some person other than him who made it.

Sec. 4010. Nothing in the above provisions shall prevent the party himself, against whom the unwritten contract is sought to be enforced, from being called as a witness by the opposite party, nor his oral testimony from being evidence.

KANSAS.

General Statutes of 1868. Chapter 43.

Sec. 6. No action shall be brought whereby to charge a party, upon any special promise, to answer for the debt, default, or miscarriage of another person, or to charge any executor or administrator upon any special promise to answer damages out of his own estate, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.

KENTUCKY.

Revised Statutes, Stanton's edition, 1859. Chapter 22.

Sec. 1. No action shall be brought to charge any person,

1. For a representation or assurance concerning the character, conduct, credit, ability, trade, or dealings of another, made with intent that such other may obtain thereby credit, money, or goods; nor,

2. Upon a promise to pay a debt contracted during infancy, or a ratification of a contract or promise made during infancy; nor,

3. Upon a promise as personal representative to answer any debt or damage out of his own estate; nor,

4. Upon a promise to answer for the debt, default or misdoing of another; nor,

5. Upon any agreement made in consideration of marriage, except mutual promises to marry; nor,

6. Upon any contract for the sale of real estate, or any lease thereof, for a longer term than one year; nor,

7. Upon any agreement which is not to be performed within one year from the making thereof; unless the promise, contract, agreement, representation, assurance or ratification, or some memorandum or note thereof, be in writing, and signed at the close thereof by the party to be charged therewith, or by his authorized agent. But the consideration need not be expressed in the writing; it may be proved when necessary, or disproved, by parol or other evidence.

Sec. 2. A seal or scroll shall in no case be necessary to give effect to a deed or other writing, but a signature without seal shall have the same efficacy for every purpose as if a seal were affixed thereto; and all writings so executed shall stand upon the same footing with sealed writings, having the same force and effect, and upon which the same actions may be founded. But this section shall not apply to an assignment by indorsement on a bond, note, or bill, nor shall it alter any law requiring the state or county seal, or the seal of a court, corporation, or notary, to any writing.

LOUISIANA.

Acts of 1858. No. 206.

Sec. 3. Be it further enacted, etc., that hereafter, parol evidence shall not be received to prove any promise to pay the debt of a third person; but that in all such cases the promise to pay shall be proved by written evidence, signed by the party to be charged, or by his specially authorized agent or attorney in fact.

Civil Code.

[Various provisions of the Civil Code relate indirectly to some of the matters provided for in the 4th and 17th sections of the Statute of Frauds, but the following contain, it is believed, all the provisions relating directly thereto.]

Art. 2308. Every matrimonial agreement must be made by an act before a notary and two witnesses.

The practice of marriage agreement under private signature is abrogated.

Art. 2311. The most ordinary conventions in marriage contracts are the settlement of the dowry, and the various donations which the husband and wife may make to each other, either reciprocally or the one to the other, or which they may receive from others, in consideration of the marriage.

Art. 2316. Husband and wife may, by their marriage contract, make reciprocally or one to the other, or receive from other persons, in consideration of their marriage, every kind of donations, according to the rules and under the modifications prescribed in the title of donations *inter vivos* and *mortis causa*.

Art. 2255. Every transfer of immovable property or slaves must be in writing; but if a verbal sale or other disposition of such property be made, it shall be good against the vendor, as well as against the vendee who confesses it when interrogated on oath, provided actual delivery has been made of the immovable property or slaves thus sold.

Art. 2415. All sales of immovable property or slaves shall be made by authentic act, or under private signature.

All verbal sale of any of these things shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted.

Art. 2437. A promise to sell amounts to a sale, when there exists a reciprocal consent of both parties, as to the thing and the price thereof; but to have its effect, either between the contracting parties, or with regard to other persons, the promise to sell must be vested with the same formalities as are above prescribed in articles 2414 and 2415 concerning sales, in all cases where the law directs that the sale be committed to writing.

MAINE.

Revised Statutes of 1857. Chapter 111.

Sec. 1. No action shall be maintained in any of the following cases:

1. To charge an executor or administrator, upon any special promise, to answer damages out of his own estate.

2. To charge any person, upon any special promise, to answer for the debt, default, or misdoings of another.

3. To charge any person, upon an agreement made in consideration of marriage.

4. Upon any contract for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them.

5. Upon any agreement that is not to be performed within one year from the making thereof.

6. Upon any contract to pay a debt after a discharge therefrom under the bankrupt laws of the United States, or assignment laws of this state.

Unless the promise, contract, or agreement, upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or by some person thereunto lawfully authorized.

Sec. 2. The consideration of any such promise, contract, or agreement need not be expressed in said writing; but may be proved by any other legal evidence.

Sec. 4. No action shall be maintained, to charge any person by reason of any representation or assurance, made concerning the character, conduct, credit, ability, trade, or dealings of another, unless made in writing, and signed by the party to be charged thereby, or by some person by him legally authorized.

Sec. 5. No contract for the sale of any goods, wares, or merchandise, for thirty dollars, or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made, and signed by the party to be charged thereby, or by his agent.

MARYLAND.

[In *Sibley v. Williams*, 3 Gill and Johnson, 62, A. D. 1830, the Court of Appeals declared that "It has always been understood that the judges under the old government laid it down as a general rule, that all statutes for the administration of justice, whether made before or after the charter" (1628), "so far as they were applicable, should be adopted." A clause substantially to the same effect was contained in the third article of the Declaration of Rights adopted in 1776, and has been continued, with slight variations, in every subsequent change of the Constitution; and accordingly, all the provisions of 29 Car. II, chap. 3, have been regarded as of force within the province and the state, without any legislative re-enactment. See also, *Clayland's Lessee v. Pearce*, 1 Harris & McHenry, 29, A. D. 1714. The existing Constitution, adopted in 1868, contains a clause (article 5,) adopting all English statutes in force on the 4th of July, 1776, which are locally applicable, and which have been introduced, used and practiced by the courts, subject to the action of the legislature of the state.]

MASSACHUSETTS.

Revised Statutes of 1859. Chapter 105.

Sec. 1. No action shall be brought in any of the following cases, that is to say:

1. To charge an executor, administrator, or assignee, under any insolvent law of this commonwealth, upon a special promise, to answer damages out of his own estate:

2. To charge a person, upon a special promise, to answer for the debt, default, or misdoings of another:

3. Upon an agreement made upon consideration of marriage:

4. Upon a contract for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them: or,

5. Upon an agreement that is not to be performed within one year from the making thereof:

Unless the promise, contract, or agreement, upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.

Sec. 2. The consideration of such promise, contract, or agreement need not be set forth or expressed in the writing signed by the party to be charged therewith, but may be proved by any other legal evidence.

Sec. 4. No action shall be brought to charge a person, upon or by reason of any representation or assurance made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance is made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

Sec. 5. No contract for the sale of goods, wares, or merchandise, for the price of fifty dollars or more, shall be good or valid, unless the purchaser accepts and receives part of the goods so sold, or gives something in earnest to bind the bargain, or in part payment; or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

MICHIGAN.

Compiled Laws of 1857. Chapter 104.

Sec. 8. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized by writing.

Sec. 9. The consideration of any contract or agreement, required by the provisions of this chapter to be in writing, need not be set forth in the contract or agreement, or in the note or memorandum thereof, but may be proved by any other legal evidence.

Sec. 10. Nothing in this chapter contained, shall be construed to abridge the powers of the Court of Chancery to compel the specific performance of agreements, in cases of part performance of such agreements.

Chapter 105.

Sec. 2. In the following cases specified in this section every agreement, contract and promise shall be void, unless such agree-

ment, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized, that is to say:

1. Every agreement that, by its terms, is not to be performed in one year from the making thereof.

2. Every special promise to answer for the debt, default, or misdoings of another person.

3. Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry.

4. Every special promise made by an executor or administrator to answer damages out of his own estate.

Sec. 3. No contract for the sale of any goods, wares, or merchandise, for the price of fifty dollars or more, shall be valid, unless the purchaser shall accept and receive part of the goods sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

Sec. 4. Whenever any goods shall be sold at auction, and the auctioneer shall, at the time of sale, enter in a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a memorandum of the contract of sale within the meaning of the last section.

Sec. 5. No action shall be brought to charge any person, upon or by reason of any favorable representation or assurance, made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

Sec. 6. The consideration of any contract, agreement or promise, required by this chapter to be in writing, need not be expressed in the written contract, agreement, or promise, or in any note or memorandum thereof, but may be proved by any other legal evidence.

MINNESOTA.

General Statutes of 1886. Chapter 41. Title II.

Sec. 6. No action shall be maintained in either of the following cases upon any agreement unless such agreement, or some note or memorandum thereof expressing the consideration, is in writing and subscribed by the party charged therewith:

1. Every agreement that by its terms is not to be performed within one year from the making thereof;
2. Every special promise to answer for the debt, default or doings of another;
3. Every agreement, promise or undertaking, made upon consideration of marriage, except mutual promise to marry.

Sec. 7. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless,

1. A note or memorandum of such contract is made in writing and subscribed by the parties to be charged therewith; or,
2. Unless the buyer accepts and receives part of such goods, or the evidences, or some of them, of such things in action; or,
3. Unless the buyer at the time pays some part of the purchase money.

Sec. 8. Whenever goods are sold at public auction, and the auctioneer at the time of sale, enters into a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, name of the purchaser, and the name of the person on whose account the sale is made; such memorandum shall be deemed a note of the contract of sale within the meaning of the last section.

Sec. 12. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party to whom the lease or sale is to be made, or by his authorized agent.

Sec. 13. Nothing in this chapter contained shall be construed to abridge the power of courts of equity to compel the specific performance of agreements in cases of part performance of such agreements.

MISSISSIPPI

Hutchinson's Code, 1848. Chapter 47. Article 1.

[Act of 1822.]

Sec. 1. No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer any debt or damage out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract for the sale of lands, tenements or hereditaments, (or the making any lease thereof for a longer term than one year) or upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him or her thereunto lawfully-authorized.

MISSOURI

General Statutes of 1865. Chapter 106.

Sec. 5. No action shall be brought to charge any executor or administrator, upon any special promise, to answer for any debt or damages out of his own estate, or to charge any person upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made in consideration of marriage, or upon any contract for the sale of lands, tenements, hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within one year from the making thereof, unless the agreement, upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized.

Sec. 6. No contract for the sale of goods, wares and merchandise, for the price of thirty dollars, or upwards, shall be allowed to be good, unless the buyer shall accept part of the goods so

sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing be made of the bargain, and signed by the parties to be charged with such contract, or their agents lawfully authorized.

Sec. 7. No action shall be brought to charge any person upon, or by reason of, any representation or assurance made concerning the character, conduct, credit, ability, trade or dealings, of any other person, unless such representation or assurance be made in writing, and subscribed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

NEBRASKA.

Territorial Statutes of 1855. Part First.

857. Except when otherwise specially provided, no evidence of any of the contracts enumerated in the next succeeding section is competent unless it be in writing and signed by the party charged or by his lawfully authorized agent.

858. Such contracts embrace:

1. Those in relation to the sale of personal property when no part of the property is delivered and no part of the price is paid;
2. Those made in consideration of marriage, but not including promises to marry;
3. Those wherein one person promises to answer for the debt, default, or miscarriage of another, including promises by executors to pay the debt of their principal from their own estate;
4. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year;
5. Those that are not to be performed within one year from the making thereof.

859. The provision of the first subdivision of the preceding section does not apply when the article of personal property sold is not at the time of the contract owned by the vendor and ready for delivery, but labor, skill, or money are necessarily to be expended in producing or procuring the same: nor do those of the fourth subdivision of said section apply where the purchase money or any portion thereof has been received by the vendor, or

when the vendee with the actual or implied consent of the vendor has taken and held possession thereof, under and by virtue of the contract, or when there is any other circumstance which by the law heretofore in force would have taken a case out of the statute of frauds.

860. The above regulations, relating merely to the proof of contracts, do not prevent the enforcement of those which are not denied in the pleadings, unless in cases where the contract is sought to be enforced or damages to be recovered for the breach thereof against some person other than him who made it.

NEVADA.

Territorial Statutes of 1861. Chapter IX.

[Continued in force by the State Constitution, Art. 17, § 2, until altered or repealed by the Legislature.]

§ 57. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to whom the lease or sale is to be made, or by his authorized agent.

Sec. 61. In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party charged therewith: First. Every agreement that, by the terms, is not to be performed within one year from the making thereof. Second. Every special promise to answer for the debt, default, or miscarriage of another. Third. Every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry.

Sec. 62. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or over, shall be void, unless: First. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or, Second. Unless the buyer shall accept or receive part of such goods, or the evidences, or some of them, of such things in action; or, Third. Unless the buyer shall, at the time, pay some part of the purchase money.

Sec. 63. Whenever goods shall be sold at auction, and the auctioneer shall, at the time of sale, enter in a sale book a memorandum, specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale, within the meaning of the last section.

NEW HAMPSHIRE.

General Statutes of 1867. Chapter 201.

Sec. 12. No action shall be maintained upon a contract for the sale of land, unless the agreement upon which it is brought, or some memorandum thereof, is in writing, and signed by the party to be charged, or by some person by him thereto authorized by writing.

Sec. 13. No action shall be brought to charge an executor or administrator upon a special promise to answer damages out of his own estate, nor to charge any person upon a special promise to answer for the debt, default, or miscarriage of another, or upon any agreement made in consideration of marriage, or that is not to be performed within one year from the time of making it, unless such promise or agreement, or some note or memorandum thereof, is in writing, and signed by the party to be charged, or by some person by him thereto authorized.

Sec. 14. No contract for the sale of goods, wares, or merchandise, for the price of thirty-three dollars, or more, is valid, unless the buyer accepts and actually receives part of the property sold, or gives something in part payment, or in earnest to bind the bargain, or unless some note or memorandum thereof is in writing, and signed by the party to be charged, or by some person by him thereto authorized.

NEW JERSEY.

Nixon's Digest, 1863, p. 358. [Act of 1794.]

Sec. 14. No action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any inter-

est in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.

Sec. 15. No contract for the sale of any goods, wares, and merchandise, for the price of thirty dollars or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

NEW YORK.

Revised Statutes. (Took effect January 1, 1830.)

Part II. Chapter VI. Title V.

Sec. 1. No executor or administrator shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, be in writing, and signed by such executor or administrator, or by some other person by him thereunto specially authorized.

Part II. Chapter VII. Title I.

Sec. 8. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party, by whom the lease or sale is to be made.

Sec. 9. Every instrument required to be subscribed by any party, under the last preceding section, may be subscribed by the agent of such party lawfully authorized.

Sec. 10. Nothing in this title contained shall be construed to abridge the powers of courts of equity, to compel the specific performance of agreements, in cases of part performance of such agreements.

Part II, chapter VII, title II. (As amended by the Statute of 1863.)

Sec. 2. In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof,¹ be in writing, and subscribed by the party to be charged therewith:

1. Every agreement that by its terms is not to be performed within one year from the making thereof;
2. Every special promise to answer for the debt, default, or miscarriage of another person;
3. Every agreement, promise or undertaking, made upon consideration of marriage, except mutual promises to marry.

Sec. 3. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless:

1. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or,
2. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or,
3. Unless the buyer shall at the time pay some part of the purchase money.

Sec. 4. Whenever goods shall be sold at public auction, and the auctioneer shall at the time of sale enter in a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser and the name of the person on whose account the sale is made; such memorandum shall be deemed a note of the contract of sale within the meaning of the last section.

Sec. 8. Every instrument required by any of the provisions of this title to be subscribed by any party, may be subscribed by the lawful agent of such party.

¹The amendment of 1863 expunged in this place the words "expressing the consideration."

NORTH CAROLINA.

Revised Code of 1854. Chapter 50.

Sec. 11. All contracts to sell or convey any lands, tenements, or hereditaments, or any interest in or concerning them, or any slave; and all leases and contracts for leasing of land for the purpose of digging for gold or other minerals, or for the purpose of mining generally, shall be void and of no effect, unless such contract or lease, or some memorandum or note thereof, shall be put in writing, signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized, except, nevertheless, leases and contracts for leases (other than those above named) not exceeding in duration the term of three years.

Sec. 15. No action shall be brought whereby to charge an executor or administrator, upon a special promise to answer damages out of his own estate, or to charge any defendant upon a special promise to answer the debt, default, or miscarriage of another person, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith, or some other person thereunto by him lawfully authorized.

OHIO.

Revised Statutes; Swan and Critchfield's edition, 1860. Chapter 47.

[Act of 1810.]

Sec. 5. That no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning of them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing,

and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.

[From the note to this chapter it would appear that there is a question whether the whole of the English statute is not in force in Ohio under an act of 1795.]

OREGON.

Code of Civil Procedure, 1863.

Sec. 775. In the following cases the agreement is void, unless the same, or some note or memorandum thereof expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence therefore of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law:

1. An agreement that, by its terms, is not to be performed within a year from the making thereof.

2. An agreement to answer for the debt, default, or miscarriage of another.

3. An agreement by an executor or administrator to pay the debts of his testator or intestate out of his own estate.

4. An agreement made upon consideration of marriage, other than a mutual promise to marry.

5. An agreement for the sale of personal property, at a price not less than fifty dollars, unless the buyer accept and receive some part of such personal property, or pay at the time some part of the purchase money; but when the sale is made by auction, an entry by the auctioneer, in his sale-book, at the time of the sale, of the kind of property sold, the terms of the sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum.

6. An agreement for the leasing, for a longer period than one year, or for the sale of real property or of any interest therein.

7. An agreement concerning real property, made by an agent of the party sought to be charged, unless the authority of the agent be in writing.

Sec. 776. No evidence is admissible to charge a person upon a representation, as to the credit, skill, or character of a third

person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by, or in the handwriting of, the party to be charged.

PENNSYLVANIA.

Purdon's Digest, Brightly's edition, p. 497.

[Act of April 26, 1855, §§ 1 and 2.]

4. No action shall be brought whereby to charge any executor or administrator, upon any promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise, to answer for the debt or default of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him authorized.

5. This act shall not go into effect until the first day of January next; or apply to or affect any contract made or responsibility incurred prior to that time; or for any contract the consideration of which shall be a less sum than twenty dollars.

RHODE ISLAND.

Revised Statutes of 1857. Chapter 176.

Sec. 8. No action shall be brought—

1. Whereby to charge any person upon any contract for the sale of lands, tenements or hereditaments, or the making of any lease thereof for a longer time than one year;

2. Whereby to charge any person upon any agreement made upon consideration of marriage;

3. Whereby to charge any executor or administrator upon his special promise to answer any debt or damage out of his own estate;

4. Whereby to charge any person upon his special promise to answer for the debt, default or miscarriage of another person;

5. Whereby to charge any person upon any agreement which is not to be performed within the space of one year from the making thereof;—

Unless the promise or agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized.

SOUTH CAROLINA.

By an act of the Province of South Carolina, passed December 12, A. D. 1712, several "statute laws of the Kingdom of England or South Britain," therein copied at length, are declared to be in "as full force, power and virtue, as if the same had been specially enacted and made for this province, or as if the same had been made and enacted therein by any general assembly thereof." Among these statutes is the 29th Car. II. chap. 3.

TENNESSEE.

Code of 1858.

Sec. 1758. No action shall be brought—

1. Whereby to charge any executor or administrator, upon any special promise, to answer any debt or damages out of his own estate;
2. Whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person;
3. Whereby to charge any person upon any agreement made upon consideration of marriage; or
4. Upon any contract for the sale of lands, tenements, or hereditaments, or the making any lease thereof for a longer term than one year; or
5. Upon any agreement or contract which is not to be performed within the space of one year from the making thereof;

Unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized.

TEXAS.

Paschal's Digest, 1866.

[Act of 1840.]

Art. 3875. No action shall be brought, (1.) whereby to charge any executor or administrator, upon any special promise to answer any debt or damage out of his own estate, (2.) or whereby to charge the defendant, upon any special promise to answer for the debt, default, or miscarriage of another person, (3.) or to charge any person upon any contract made upon consideration of marriage, (4.) or upon any contract for the sale of lands, *slaves*, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year, (5.) or upon any agreement which is not to be performed within the space of one year from the making thereof; unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or some person by him thereunto lawfully authorized.

VERMONT.

General Statutes of, 1868. Chapter 66.

Sec. 1. No action at law or in equity shall be brought in any of the following cases:

1. To charge an executor or administrator upon any special promise to answer damages, out of his own estate.
2. To charge any person, upon any special promise, to answer for the debt, default or misdoings of another.
3. To charge any person, upon any agreement made upon consideration of marriage.
4. Upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them.
5. Upon any agreement not to be performed within one year from the making thereof.

Unless the promise, contract or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized;

and if the contract or agreement relate to the sale of real estate, or to any interest therein, such authority shall be conferred by writing.

Sec. 2. No contract for the sale of any goods, wares, or merchandise, for the price of forty dollars or more, shall be valid, unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum of the bargain be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

Sec. 3. No action shall be brought to charge any person upon or by reason of any representation or assurance, made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

VIRGINIA.

Revised Code of 1860. Chapter 143.

Sec. 1. No action shall be brought in any of the following cases:

1. To charge any person upon or by reason of a representation or assurance concerning the character, conduct, credit, ability, trade, or dealings of another, to the intent or purpose that such other may obtain thereby credit, money, or goods; or,

2. To charge any person, upon a promise made, after full age, to pay a debt contracted during infancy, or upon a ratification after full age of a promise or simple contract made during infancy; or,

3. To charge a personal representative upon a promise to answer any debt or damages out of his own estate; or,

4. To charge any person upon a promise to answer for the debt, default, or misdoings of another; or,

5. Upon any agreement made upon consideration of marriage; or,

6. Upon any contract for the sale of real estate, or the lease thereof for more than a year; or,

7. Upon any agreement that is not to be performed within a year;

Unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged thereby, or his agent. But the consideration need not be set forth or expressed in the writing; it may be proved (where the consideration is necessary) by other evidence.

Sec. 2. Any writing, to which the person making it shall affix a scroll by way of seal, shall be of the same force as if it were actually sealed.

WEST VIRGINIA.

[By the Constitution of West Virginia, adopted in 1862, the Statutes of Virginia are continued in force until altered or repealed by the Legislature.]

WISCONSIN.

Revised Statutes of 1858. Chapter 106.

Sec. 8. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made.

Sec. 9. Every instrument required to be subscribed by any party, under the last preceding section, may be subscribed by the agent of such party, lawfully authorized.

Sec. 10. Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in cases of part performance of such agreements.

Chapter 107.

Sec. 2. In the following cases, every agreement shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party charged therewith:—

1. Every agreement that by the terms is not to be performed within one year from the making thereof.

2. Every special promise to answer for the debt, default, or miscarriage of another person.

3. Every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry.

Sec. 3. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless—

1. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or—

2. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or—

3. Unless the buyer shall, at the time, pay some part of the purchase money.

Sec. 4. Whenever goods shall be sold at public auction, and the auctioneer shall, at the time of sale, enter in a sale-book a memorandum, specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person for whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the last section.

Sec. 8. Every instrument required by any of the provisions of this title to be subscribed by any party, may be subscribed by the lawful agent of such party.

The foregoing are the enactments now in force; but, except in Pennsylvania and Louisiana, the recent statutes in the older States are re-enactments, sometimes with amendments, of similar provisions contained in former acts



A TREATISE
ON THE
VALIDITY OF VERBAL AGREEMENTS.

INTRODUCTORY CHAPTER.

GENERAL SURVEY OF THE STATUTE OF FRAUDS, ESPECIALLY
THOSE PARTS OF IT WHICH RELATE TO EXECUTORY CONTRACTS.

ARTICLE I.

Object, origin, history and effect of the statute; different opinions which have prevailed relative to the spirit in which it should be construed; effect of such opinions upon the rules determining the application of the fourth and seventeenth sections.

§ 1. Probably no beneficial legislative enactment ever received from the legal profession a designation so well calculated to mislead an unprofessional person, or a jurist under other systems, respecting its contents, as the celebrated statute of the twenty ninth of Charles the second, known as the Statute of Frauds and Perjuries, or more commonly, as the Statute of Frauds. To any mind not previously instructed respecting its subject matter, those terms suggest the idea, either that it is a part of the criminal code, or that it provides some new method of detecting, in civil actions, the commission of the criminal acts at which it purports to have been aimed, and of nullifying their consequences. Nor is this impression much weakened by the phraseology of its legal title, which affords but little evidence that the leading design of its framers was to preclude the determination of the rights of litigants upon oral testimony merely, in certain cases, where experience had shown that such evidence tended to facili-

tate the accomplishment of fraud under the forms of law, and offered peculiar temptations to the commission of perjury.

§ 2. The fact that the framers of the act laid such stress in its title, and again in its general preamble, and still again in the special preamble to the nineteenth section, upon the consequences of the defects in the law of evidence which they proposed to remedy, to the exclusion of any reference to the direct purpose of the enactment, affords very striking proof of the prevalence of the evils which led to its passage. At that time the rules of evidence, derived from a period when to require written proof in support of any description of claims, would have been almost tantamount to providing that such claims should no longer be enforced by legal proceedings, imposed scarcely any limits to the power and the duty of the courts to determine the rights of litigants, upon oral testimony merely. A man might be deprived of his real or personal property, in any appropriate form of action; he might be made liable for the performance of executory contracts of every description; and his personal property might be disposed of to strangers after his death, (a) upon proof, even in the most guarded cases, of equivocal acts; and, in nearly every case, of spoken words only. If such a state of things could safely be permitted when the population was scanty, and men were comparatively poor, simple, and ignorant, it is evident that it opened the door to great abuses, as population, business, and wealth increased, and the vices, as well as the virtues of civilization became generally diffused among the people. It is therefore easy to understand that false swearing had become so common, that the legislature felt itself urgently called upon "for the prevention of many fraudulent practices, which are commonly upheld by perjury and subornation of perjury," to revise the rules of

(a) The state of the law with respect to proof of testamentary disposition of real property was not much better. Roberts on Frauds, pages 304 to 308.

evidence in cases where the temptation to fabricate a cause of action was the greatest, in consequence of the difficulty of detecting the falsity of the oral testimony by which it would be sustained. Indeed, one is tempted to believe, that there was something more than an accidental coincidence in the suppression, by the statute of frauds, of a vast field for the successful practice of perjury in the civil courts, and the scandalous instances of the same crime in the criminal courts, which have made the period immediately succeeding the passage of the statute one of the most infamous in English history.

§ 3. The origin of the statute of frauds has been the subject of much curious inquiry, opinions having greatly differed respecting the person to whom belonged the credit, or, as some enthusiastically express it, the glory, of having framed the act, and most contributed to its passage. Common reputation upon this point was for a long time divided between Sir Matthew Hale, who died before the commencement of that session of parliament, Sir Francis North, then Chief Justice of the Common Pleas and afterwards Lord Guilford, and Sir Lionel or Leoline Jenkins, an eminent civilian. And the discussion frequently turned upon the internal evidence of its authorship, which the statute itself affords; that is to say, whether its provisions are so wisely adapted to accomplish the ends proposed, and its language so well chosen to express clearly the ideas intended to be conveyed, that it is reasonable to suppose it to have been the work of one or all of the great jurists to whom its origin has been attributed. And while there has been considerable diversity of sentiment respecting the policy of some of its provisions, nearly all commentators agree in condemning the awkwardness and incongruity of much of its phraseology. But this patent defect should not detract from the fame of its original draftsman, or militate against the argument that its general plan was the product of a master mind. A bill designed to accomplish the most radical changes in the law, which affected the interests of every man of substance

in the kingdom, could not reasonably be expected to pass through both Houses of Parliament without being subjected to numerous amendments; and these, being doubtless framed by different persons, some of whom were inferior in mental calibre to its original author, would naturally mar its symmetry of expression as well as of design. And the records of parliament show, that it was subjected to many alterations after its first introduction into either House; and that when its terms were finally agreed upon, there was so much doubt as to the result of the changes which it contemplated, that an effort was made, and nearly proved successful, to render it experimental merely, by limiting the time during which it should operate. (b)

(b) In the note to *Right v. Price*, 1 Douglas, 241, A. D. 1779, it is said that "the statute of frauds is generally supposed to have been made upon great consideration; on an attentive perusal, however, it will not appear to have been accurately penned." See to the same effect *Buckeridge v. Ingram*, 2 Vesey, 662, and per Lawrence, J., in *Wain v. Warlters*, 5 East, 10. But the published journals of the two Houses afford abundant evidence of the anxiety which its introduction occasioned, and of the care bestowed upon it; and fully account for the patchwork appearance which it now presents. In the House of Lords the bill was read the first time on the 17th, and the second time on the 19th of January, 1676; and after the second reading it was referred to a committee, to meet the next day, consisting of thirty-seven temporal and ten spiritual peers, "Lord Chief Justice Common Pleas, Justice Windham, Justice Jones and Justice Scroggs, to assist;" on the 6th of March, the Earl of Dorset reported, that the committee "had met *several times*, and are of opinion that the said bill is fit to be engrossed, *with some amendments*," which was ordered to be done accordingly, and the next day it was read the third time and passed. On the same 7th of March, it was sent to the Commons for concurrence, and read for the first time on the 13th of March, whereupon it was ordered to be read the second time, "in a full house;" the second reading was on the second day of April following (1677), when the bill was referred to a committee, to meet the next day, consisting of more than fifty members, including the Master of the Rolls, Mr. Serjeant Seys, and Mr. Serjeant Maynard, to whom were added "all the members of this House that are of the long robe;" on the 12th of April, Sir Charles Harbord reported from the committee "*several amendments agreed by the committee* to be made to the bill, which were twice read, and all but the last amendment (*which was to make the bill temporary*) were, upon the question, agreed," and the bill with the amendments was read the

§ 4. But in the various discussions which took place respecting the origin of this statute, after the generation which framed it had passed away, no one seems to have suspected that the "father of equity" had any hand in its composition, much less that he was its author; and although that fact must have been known to many of his cotemporaries, and, in truth, was announced by him in the Court of Chancery, it seems to have been kept a secret from the general public for nearly one hundred and fifty years after the act took effect. It was first revealed by the publication of Mr. Swanston's Chancery Reports, about the year 1821, containing, in an appendix to the current decisions of Lord Eldon, transcripts of the notes of Lord Nottingham, of several cases decided before him when he

third time, passed, and ordered to be returned to the Lords. On the same day the amendments were agreed to in the Lords; and on the 16th of April, the King being present, the bill was presented to him, and received the royal assent. Lord Ellenborough's opinion in the celebrated case of *Wain v. Warlters*, 5 East, 10, A. D. 1804, where it was held that the note or memorandum in writing required by the fourth section must contain the consideration, turned chiefly upon the meaning of the word "agreement," and in defending his conclusion, he remarked that the statute was said to have been drawn by Lord Hale, "one of the greatest judges who ever sate at Westminster Hall, who was as competent to express, as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law." Lord Chief Baron Gilbert, in *Whitchurch v. Whitchurch*, Gilbert's Equity Reports, 171, A. D. 1721, referring to the provisions of the statute on the subject of wills of real estate, said that "Sir Matthew Hale and Sir Lionel Jenkins, who prepared this statute, chose to take the plan of a Roman law:" or according to the report of the same case in 1 Strange, 621, that it "was contrived by the Lord Chief Justice Hale and the most learned men of that time." But in *Windham v. Chetwynd*, 1 Burrow, 418, A. D. 1757, where the question was, what was the true construction of the word "credible" in the fifth section, Lord Mansfield said that this clause, which, considering the time when, and the circumstances under which, men were frequently called upon to follow its directions, ought to have been plain to the meanest capacity, "is so loose, that there is not a single branch of the solemnity defined or described with sufficient certainty to convey the same idea to the greatest capacity," and that the word "credible" must have slipped in, without attracting attention to its impropriety. And referring to the report that the statute was drawn by Lord Hale, he added: "But this is scarce probable. It was not passed till after his death, and it

was chancellor, among them that of *Ash v. Abdy*, 3 Swanston, 664, decided in 1678, the year after the statute was enacted. This was a bill to execute a parol agreement, made before the passage of the act, but the bill having been filed afterwards, the defendant demurred, "supposing the new act had barred this suit," and Lord Nottingham overruled the demurrer, on the ground that the statute was not retrospective. He added: "And I said that I had some reason to know the meaning of this law, for it had its first rise from me, who brought the bill into the Lords' House, although it afterwards received some additions and improvements from the judges and the civilians. And the counsellors at the bar cited another case in the King's Bench this very term, where the same point being specially found, was so likewise adjudged upon argument, which I was glad to hear of; but said if they had adjudged it otherwise I should not have altered my opinion."

was brought in in the common way, and not upon any reference to the judges." In 1 W. Blackstone, 98, this remark is quoted thus: "I can never conceive, for the reasons I formerly mentioned, that this statute was drawn by Lord Hale, any further than by, perhaps, leaving some loose notes behind him, which were afterwards unskillfully digested." The evidence, upon which rests Sir Francis North's claim to its authorship, consists mainly of the statement of his brother, Roger North, who says, in the *Life of Lord Keeper Guilford*, volume 1, page 109, that the Lord Keeper had a great hand in the statute of frauds and perjuries. "But," he continues, "at that time the Lord Chief Justice Hale had the pre-eminence, and was chief in the fixing that law, although the urging part lay upon him, and I have reason to think it had the first spring from his lordship's motion." Mr. John William Smith (author of the "*Leading Cases*"), in his lectures on the Law of Contracts, page 32, says: "It is said to have been the joint production of Sir Matthew Hale, Lord Keeper Guilford, and Sir Leoline Jenkins, an eminent civilian. The great Lord Nottingham used to say of it, 'that every line was worth a subsidy'" (about 50,000*l.*); "and it might now be said, with truth, that every line has cost a subsidy; for it is universally admitted that no enactment of any legislature ever became the subject of so much litigation. Every line, and almost every word of it, has been the subject of anxious discussion, resulting from the circumstances that the matters which its provisions regulate, are those which are of every day occurrence in the course of our transactions with one another."

§ 5. The subject of this work restricts us to the consideration of the fourth and the seventeenth sections of the statute, which are the only parts of it relating to verbal agreements, properly so called ; for although leases, trusts, and some of the other subjects of its provisions, may in one sense be called agreements, inasmuch as they generally arise out of a contract, that particular feature of them very rarely presents any question for the consideration of the court as respects the application of the statute thereto, unless they are brought within one of these sections by some peculiarity of the facts. Provisions generally corresponding to these sections have now the force of law in all of the United States, although in a few of them the seventeenth section has not been re-enacted, and some of the descriptions of contracts enumerated in the fourth have been omitted. They were also re-enacted in Ireland in the seventh year of king William the third, and corresponding legislative provisions are in force in most, and perhaps all of the British dependencies. Additional enactments have from time to time been passed by parliament, and by the legislatures of some of the United States, whereby a writing is made necessary to the creation of other kinds of liabilities ; but these vary considerably in the different localities ; so that for the purpose of a comprehensive discussion of the rules of law, whereby the validity of verbal agreements is tested, in countries where the common law prevails, it is necessary only to examine the principles by which the application of these sections is regulated. And it results from the fact that the common law enables all executory agreements to be created and proved without writing, that in cases not included within these sections, and where no local statute expressly or by implication establishes a different rule, a verbal agreement is always sufficient to enable the plaintiff to recover.^(c) Thus a verbal submission to arbitration is good, and a verbal agreement to arbitrate entitles a party

(c) Per Selden J. in *Pratt v. Hudson River Railroad Company*, 21 New York, 309.

to maintain an action thereon, when the matter in dispute is of such a character that the statute of frauds permits it to be proved by oral testimony. (d) And although a contrary opinion is to be found in some works of highly reputable authority, it is believed that in the countries governed by the common law, a verbal contract of marine or fire insurance is valid. It has been held in several cases in the United States that an action at law may be maintained upon such a contract, even where there had been no actual payment of the premium, but only a verbal, or even an implied agreement to pay it. (e)

(d) *Kyd on Awards*, page 10; *Martin v. Chapman*, 1 Alabama, 278; *Byrd v. Odean*, 9 id. 755; *Valentine v. Valentine*, 2 Barbour's Chancery (New York), 430; *Titus v. Scantling*, 4 Blackford (Indiana), 89; *Walters v. Morgan*, 2 Cox's Chancery, 369; *Winne v. Elderkin*, 1 Chandler (Wisconsin), 219; *Dater v. Wellington*, 1 Hill (New York), 319; *Smith v. Douglas*, 16 Illinois, 34; *Griggs v. Seeley*, 8 Indiana, 264; *Houghton v. Houghton*, 37 Maine, 72; *French v. New*, 28 New York, 147; *McMullen v. Mayo*, 8 Smedes and Marshall (Mississippi), 298; *Woods v. Page*, 37 Vermont, 252; *Wells v. Lain*, 15 Wendell (New York), 99.

(e) In *Millar on Insurance*, 30, it is said that the importance of the contract of insurance, and the singularity of the obligations which it is intended to create, have, in all commercial states, rendered a deed in writing essential to its validity. In *Duer on Insurance*, § 5, the learned author, while admitting that by the common law an unwritten contract of insurance is sufficient, expresses an opinion that the usage of a written contract has prevailed so long, that it has acquired the force of law, and he doubts whether an action could be sustained upon one which was oral. But the rule is settled the other way upon the American authorities. In *Audubon v. The Excelsior Insurance Company*, 27 New York, 216, A. D. 1863, the plaintiff's testator sent five sets of "Audubon's Quadrupeds," in sheets, to a bookbinder's to be bound; and in the afternoon of the same day, being Saturday, he sent a person in his employment to the defendant's office, to effect an insurance upon them for a specified sum, for one month. The messenger applied to the secretary, giving him all the necessary particulars; and the secretary assented and said that he would furnish a policy on the Monday morning. No amount of premium was mentioned; but there was a reference in the conversation to a policy which had been previously issued by the same company, upon other sets of the work, at the same place, and for the same time. The property was destroyed by fire on the intervening Sunday. It was held that the jury might infer a present contract to insure at the former rate of premium and to furnish the written evidence of it on Monday, and a judgment for

§ 6. In the course of the decisions under these two sections, now extending over almost two centuries, many very perplexing questions have arisen, and several propositions have been from time to time laid down, as law, resulting in the exclusion from the operation of the statute of many cases; which, as it is now impossible to doubt, are within its terms and intent. As many of these propositions depend upon such unsatisfactory reasoning that they may almost be called arbitrary, the rulings of the courts thereunder have fluctuated greatly, thus leading to distressing uncertainty and to much conflict of authority. The inconveniences resulting therefrom have been so great that some doubts have been expressed, especially of late years, and in the United States, whether the effect of those sections of the statute has been, upon the whole, beneficial. (f) But many of these

the plaintiff rendered upon a verdict was affirmed. And see *Mobile, etc., Insurance Company v. McMillan*, 31 Alabama, 711; *Post v. Aetna Insurance Co.*, 43 Barbour (New York), 351; *Kelley v. Commonwealth Ins. Co.*, 10 Bosworth (New York), 82; *Union, etc., Ins. Co. v. Commercial, etc., Ins. Co.*, 2 Curtis Circuit Court, 524; S. C., 19 Howard (U. S.), 318; *New England, etc., Co. v. Robinson*, 25 Indiana, 536; *Trustees First Baptist Church v. Brooklyn Ins. Co.*, 19 New York, 305; *Hamilton v. Lycoming Ins. Co.*, 5 Pennsylvania (Barr), 339.

(f) Chief Justice Parker, in *Holmes v. Knights*, 10 New Hampshire, 176, said that it might well be doubted whether the second clause of the fourth section of the statute has not promoted more fraud than it has prevented. Mr. Rawle, in his notes to Smith's *Lectures on Contracts*, third American edition, published in 1853, expressed his satisfaction because the State of Pennsylvania had never re-enacted the fourth section (page 118); and Mr. Hare concluded a long and able note to *Birkmyr v. Darnell*, in 1 Smith's *Leading Cases*, fourth American edition, 332, published in 1852, with the expression of an opinion that less inconvenience had resulted in Pennsylvania from its absence from the statute book, than would have been caused by its presence, and of a belief that the necessity for that section has passed away with the change of society. He added, that "all that is practically useful in its provisions at the present day may perhaps be attained by providing that promises for the debt of another, in consideration solely of forbearance to bring suit, should be invalid unless reduced to writing." But the current of opinion seems to have run in the contrary direction to that of those able jurists; for in 1855 the legislature of Pennsylvania adopted that portion of the fourth section against which their remarks were particularly directed.

evil consequences are directly traceable to departures from the spirit and meaning of the enactment, rather than to any lack of wisdom in its provisions, or any real difficulty in determining the true construction of its language. Most of the objectionable rules referred to had their origin in cases decided in England, within a period of time which may approximately be described as the first of the two centuries elapsed since the enactment of the statute; and where they have not been modified by the action of the legislature, they have generally been abandoned by the courts themselves, in consequence of a change in the views of the judges respecting the spirit in which the statute ought to be construed. This change became quite apparent towards the latter part of the eighteenth and the beginning of the nineteenth century, soon after the time when the United States came into existence as a separate nation; and the same general views have prevailed ever since in England. (g) But the

(g) In the case of *Proctor v. Jones*, 2 Carrington and Payne, 532, A. D. 1826, which arose under the seventeenth section, Best, C. J., said: "The statute of frauds and the statute of limitations were both so much objected to, at the time when they were passed, that the judges appeared anxious to get them off the statute book; but in later times they have become desirous to give them their full effect. I think the statute of frauds is a good and wholesome statute. In other countries, contracts are made in writing." And see also his remarks in *Howe v. Palmer*, 3 Barnewall and Alderson, 321, A. D. 1820. It is quite noticeable that the expressions of sympathy with the object of these sections of the statute, began to be universal with the judges about the commencement of the present century. Lord Kenyon on several occasions expressed his approbation of them. In *Chater v. Becket*, 7 Term Reports, 201, A. D. 1797, which arose under section 4, he said: "I lament extremely that exceptions were ever introduced in construing the statute of frauds; it is a very beneficial statute, and if the courts had at first abided by the strict letter of the act, it would have prevented a multitude of suits which have since been brought." See also his remarks in *Rucker v. Cammeyer*, 1 Espinasse, 105, A. D. 1794; and in *Chaplin v. Rogers*, 1 East, 194, A. D. 1801, both under the 17th section. Grose, J., expressed the same opinion in *Cooper v. Ellston*, 7 Term Reports, 16, A. D. 1796. Sir James Mansfield, Chief Justice of the Common Pleas, in *Anstey v. Marden*, 4 Bosanquet and Puller (1 New Reports), 124, A. D. 1804, said that, upon general principles, no one could wish to restrain the operation of

courts in the United States seem to have been deeply imbued, at the commencement of the independent existence of this country, with the spirit which was then disappearing in the mother country; and fortified by English precedents, they pushed on for many years after the reaction had taken place there, in the direction of restricting the operation of the statute, and even devised new propositions for the exclusion of cases from its provisions. Many of these doctrines, which were unable to endure the test of time, have since yielded to the more liberal and enlightened views, respecting the statute, which now prevail here also; but some have become fortified by so many precedents, that their complete extinction has not everywhere been accomplished. And as the effects of the reaction are not yet fully developed, we are still in an uncertain, and, perhaps, in a transition state, with respect to many principles of constant practical application; whence results a confusion, which, in some classes of cases, is almost chaotic.

§ 7. But out of this evil much good has also sprung; for the reaction having taken place here later than in England, it found the general principles against which it operated much more developed than they had ever been in that country; and out of this development have

the statute. Lord Ellenborough's remarks in *Wain v. Warlters*, 5 East, 10, A. D. 1804, have already been quoted. And see per Buller, J., *Brodie v. St. Paul*, 1 Vesey, 333, A. D. 1791. Lord Eldon, in *Cooth v. Jackson*, 6 Vesey, 37, A. D. 1801, in discussing a question arising under the fourth section, said: "I feel all the disinclination, which has been lately expressed, and strongly expressed in many cases, to carry what may be called the struggles of courts of justice to take cases out of the reach of that statute further than they have been carried." Lord Tenterden repeatedly expressed his opinion, in cases arising under both the fourth and seventeenth sections, that the statute of frauds was a wise and beneficial enactment, and should be liberally construed. *Howe v. Palmer*, 3 Barnewall and Alderson, 321, A. D. 1820; *Tempest v. Fitzgerald*, id. 680; *Baldey v. Parker*, 2 Barnewall and Cresswell, 40, A. D. 1823. See also per Bayley, J., in *Saunders v. Wakefield*, 4 Barnewall and Alderson, 595, A. D. 1824; and *Carter v. Toussaint*, 5 Barnewall and Alderson, 855, A. D. 1822.

sprung many really sound and valuable rules of construction of the statute, which have held their ground by common consent against the receding tide, and are now well settled rules of American jurisprudence, although they are known but imperfectly, or not at all, in Westminster Hall. One of these principles has recently been borrowed from us, and appears to be now recognized in England as a sound rule of law, although when it was first settled here, it was supposed to be in direct conflict with the result of the English cases;^(h) and it is believed that the omission of the English courts to recognize several other principles, which stand here on a very solid foundation, proceeds from the fact that the questions have never been directly raised before them. And while it is impossible to deny, that in many respects the exclusion from the operation of the statute, of cases arising under these sections, and clearly within their literal meaning, has been pushed much further than a correct view of its spirit and policy will justify, it is equally true that the indiscriminate condemnation of rules having the effect to restrict the broad language of the statute is unwise and indefensible. For the looseness and incongruity of expression, of which so many complaints have been made, in cases arising under other parts of the statute, is equally characteristic of these sections. Mr. Justice Wilmot remarked, in a case arising under the seventeenth section,⁽ⁱ⁾ that "had the statute of frauds always been carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting rather than by preventing frauds." And the remark is also eminently true of the fourth section also, as will appear from numerous instances contained in the following pages, where the letter of the

(h) We refer to the rule that the guaranty of a factor acting under a *del credere* commission is not within the statute of frauds, *Couturier v. Hastie*, 8 Exchequer, 40, A. D. 1852; approved in *Wickham v. Wickham*, 2 Kay and Johnson, 478, A. D. 1855. The subject will be fully discussed in the second article of the eighteenth chapter.

(i) *Simon v. Motivos*, 1 W. Blackstone, 599, A. D. 1766.

enactment has been made to yield to its obvious intent, from the consideration that the case was not within the mischiefs against which it was aimed, and a literal construction would lead to injustice and inconveniences which the legislature could not have meant to create.

ARTICLE II.

The statute superadds the necessity of a writing, to the common law requirement that every contract must be founded upon a sufficient consideration.

§ 8. It was remarked, in the foregoing article, that the leading object of the statute of frauds was to exclude oral testimony, as a means by which the rights of litigants could be determined, in certain cases, where experience had shown that it was peculiarly liable to abuse; and with respect to the cases included in the fourth and seventeenth sections, such was exclusively its object and effect. At the time when the statute went into operation, there was no rule of the common law requiring any executory contract to be manifested by a writing, or any other evidence than that of mere words; and we are not aware that any such rule ever existed in England, although an ingenious and learned writer on the law of evidence has collated the substance of some early but then obsolete statutes, whereby certain solemnities were rendered necessary to the actual transfer of the title to personal property. (a)

(a) Professor Greenleaf says that "this statute introduced no new principle into the law; it was new in England only in the mode of proof which it required. Some protective regulations, of the same nature, may be found in some of the early codes of most of the Northern nations, as well as in the laws of the Anglo-Saxon princes; the prevention of frauds and perjuries being sought, agreeably to the simplicity of those unlettered times, by requiring a certain number of witnesses to a valid sale, and sometimes by restricting such sales to particular places. In the Anglo-Saxon laws, such regulations were quite familiar; and the statute of frauds was merely the revival of obsolete provisions, demanded by the circumstances of the times, and adapted, in a new mode of proof, to the conditions and habits of the trading community." These remarks are followed up with an abstract of several of the laws of the Saxon Kings requiring witnesses to render sales

§ 9. But although it would seem very clear upon principle that the statute left the common law untouched in all respects, except where it expressly provided a different rule, yet for a long time after its passage the idea was entertained by many eminent English jurists, that it had the indirect effect to create a new species of contracts, intermediate between specialties and parol agreements, which so far partook of the nature of the former, that a consideration was not necessary where the contract had been reduced to writing, so as to satisfy the requirements of the statute. And it is, perhaps, the most remarkable circumstance connected with its history, that a question of such great importance, and which must have arisen very frequently in practice, should have remained unsettled for a century after the statute took effect. As late as the year 1765, in the case of *Pillans v. Van Mierop*, 3 Burrow, 1663, we find no less a man than Lord Mansfield intimating an opinion that there was no such thing as a nudum pactum in writing; because, he said, "the ancient notion about want of consideration was for the sake of evidence only, for when it was reduced to writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration. And," he added, "the statute of frauds proceeded upon the same principle." In the same case Mr. Justice Wilmut entered into quite an extended argument to the same effect, concluding by saying, "I cannot find that a nudum pactum evidenced by writing has been ever holden bad, and I should think it good, though where it is merely verbal it is bad." These remarks proved to be unnecessary to the decision of the case, for Lord Mansfield ultimately concluded that the question did not arise, because the particular promise

valid, and an enactment of William the Conqueror to the same effect. Some of these laws also render it necessary that sales should take place in cities. But there is nothing in any of them prescribing any particular solemnity or formality for any species of executory contracts; although these were similarly provided for in the Roman law, and in several laws of continental countries. 1 Greenleaf's Evidence, tenth edition, note to § 262.

before the court was a mercantile contract, and no objection had been taken at the trial on the ground of want of consideration; and the other judges concluded that there was in fact a sufficient consideration for the promise. But so decided an expression of opinion, from jurists of such acknowledged eminence, could not fail to raise grave doubts upon this important question, which were not set at rest until the decision of the House of Lords to the contrary, in a case where apparently the suggestions thrown out in *Pillans v. Van Mierop* had been adopted as the true rule of law, by the judgment of the Court of King's Bench.

§ 10. The case to which we allude is *Rann v. Hughes*, decided A. D. 1778, and reported in 4 Brown's Parliamentary Cases, 27, where the pleadings and arguments of counsel are given at great length, but without any statement of the reasoning upon which the decision proceeded; but the latter is to be found in a note to another case reported in 7 Term Reports, 350. The action was brought in the King's Bench, where the plaintiffs declared as executors against the defendant, Isabella Hughes, individually. The declaration alleged (in brief) that one John Hughes was indebted to the plaintiffs' testator in a specified sum; that he died possessed of goods the value of which largely exceeded the amount of the debt; that administration thereof had been granted to the defendant; that the plaintiffs were executors of the creditor; "by reason of which premises," the defendant, as administratrix, became liable to pay to the plaintiffs, as executors, the said sum, etc., "and being so liable, she, the said Isabella, in consideration thereof, afterwards, etc., undertook and to the said John and Arthur then and there faithfully promised to pay them the said sum of money, etc., when she, the said Isabella, should be thereunto afterwards requested." The defendant pleaded, first, non assumpsit; secondly, plene administravit; thirdly, plene administravit praeter, etc., and a bond debt sufficient to absorb the balance. The plaintiffs replied to the pleas;

and at the trial the jury found a verdict for the plaintiffs on the first issue, and for the defendant on the second. A motion for a new trial (in the King's Bench) was denied, and a general judgment entered up against the defendant. Upon a writ of error in the Exchequer Chamber, the judgment was reversed, and from the judgment of reversal a writ of error was brought in the House of Lords. After very full argument upon all the points, the following question was put to the judges, namely, "whether sufficient matter appears upon this declaration, to warrant, after verdict, the judgment entered up against the defendant in her personal capacity?" In answer to which, Lord Chief Baron Skynner delivered the opinion of the judges in extenso, referring in detail to the remarks of the Chief Justice and Mr. Justice Wilmot in the preceding case, and to another case, not reported, where the same doctrines were advanced. With respect to the idea that a writing rendered a contract valid without a consideration, he said, that although the presumption was, after verdict, that the promise was in writing, it would not help the plaintiffs; because the law of England recognized only two species of contracts, specialties and parol agreements, that there was no intermediate class, and a written contract not under seal was merely a parol agreement, the consideration of which must be averred and proved; that the consideration for the defendant's promise, alleged in this declaration, was insufficient in law, as it consisted merely of an indebtedness of the defendant in another right, without forbearance or any other act which amounted in law to a valuable consideration. In this opinion the other judges concurred; and the judgment of the Exchequer Chamber was accordingly affirmed. (b)

(b) The following are the material portions of this opinion: "It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is '*nudum pactum ex quo non oritur actio*;' and whatever may be the sense of this maxim in the civil law, it is in the last mentioned sense only that it is to be understood in

§ 11. This decision has been justly regarded as setting the question at rest; and we believe that there are no further traces in common law cases, of a doctrine sanctioned by judicial opinion, that the statute effected any change whatever in the rules of the common law, requiring a consideration for every contract, and prescribing what

our law. The declaration states that the defendant, being indebted as administratrix, promised to pay when requested, and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise, but the promise must be coextensive with the consideration, unless some particular consideration of fact can be found here, to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right, in consideration of forbearance for a particular time, promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right; but here no sufficient consideration occurs to support this demand against her in her personal capacity; for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request, what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing, that takes away the necessity of a consideration and obviates the objection of nudum pactum, for that cannot be where the promise is put into writing; and that after verdict, if it were necessary, to support the promise, that it should be in writing, it will be presumed that it was in writing; and this last is certainly true; but that there cannot be nudum pactum in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England." "All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. It is said that the statute of frauds has taken away the necessity of any consideration in this case; the statute of frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable." His lordship added that the words of the statute are merely negative, "and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought, or some memorandum thereof was in writing and signed by the party. But this does not prove that the agreement was not still liable to be tried and judged of, as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition that when in writing the party must be at all events liable."

shall be a sufficient consideration to sustain an action upon it. Nevertheless it has been found necessary to reiterate in numerous subsequent cases (some of which involve no question under the statute), the principle that a writing, not under seal, will not suffice to sustain an action upon a promise, without proof of a sufficient consideration; as will appear from an examination of the various elementary works on the law of contracts. But in cases arising under the statute there is a constant necessity for keeping this principle in mind: for the tendency is very noticeable, to draw from rulings made in previous adjudications relating entirely to the sufficiency of the consideration, and arguments by which such rulings are sustained, conclusions upon the question whether the statute is applicable. The books contain many erroneous decisions and unsound doctrines, which may be directly traced to this species of misapprehension of prior obscure cases. It must therefore be remembered, throughout all the discussion which follows, that, in every instance where the statute is applicable, there are two requisites to the validity of an undertaking, namely, first, the common law requires that it should be supported by a sufficient consideration; and secondly, the statute superadds the requirement that it should be manifested by a writing. (c)

(c) The decisions to this effect are so numerous that we will make no attempt to collate them all; the following are but a small portion of the whole: *Saunders v. Wakefield*, 4 *Barnewall and Alderson*, 595; *Pratt v. Humphrey*, 22 *Connecticut*, 317; *Clapp v. Lawton*, 31 *id.* 95; *Mosely v. Taylor*, 4 *Dana* (Kentucky), 542; *Semple v. Pink*, 1 *Exchequer*, 74; *Lines v. Smith*, 4 *Florida*, 47; *Wyman v. Gray*, 7 *Harris and Johnson* (Maryland), 409; *Elliott v. Giese*, 7 *id.* 457; *Draughan v. Bunting*, 9 *Iredell* (North Carolina), 10; *Sears v. Brink*, 3 *Johnson* (New York), 210; *Ballard v. Walker*, 3 *Johnson's Cases* (New York), 60; *Mills v. Wyman*, 20 *Massachusetts* (3 *Pickering*), 207; *Stone v. Symmes*, 35 *id.* (18 *Pickering*), 467; *Nelson v. Boynton*, 44 *id.* (3 *Metcalf*), 396; *Furbish v. Goodnow*, 98 *id.* 296; *Boyce v. Owens*, 2 *McCord* (S. C.), 208; *Cook v. Elliott*, 34 *Missouri*, 586; *Mallory v. Gillett*, 21 *New York*, 412; *Barrell v. Trussell*, 4 *Taunton*, 117; *Bank of Troy v. Topping*, 9 *Wendell* (New York), 273; *Harrington v. Rich*, 6 *Vermont*, 666.

PART FIRST.

**OF SPECIAL PROMISES OF EXECUTORS AND
ADMINISTRATORS TO ANSWER DAMAGES
OUT OF THEIR OWN ESTATES.**

CHAPTER FIRST.

CONSIDERATION OF THE FIRST CLAUSE OF THE FOURTH SECTION OF THE STATUTE.

ARTICLE I.

Points of similarity and dissimilarity between cases arising under the first and second clauses respectively; whether this clause applies to promises made before the grant of letters.

§ 12. That part of the fourth section of the statute of frauds which is to be discussed in this chapter, provides that no action shall be brought upon any verbal agreement, "WHEREBY TO CHARGE ANY EXECUTOR OR ADMINISTRATOR UPON ANY SPECIAL PROMISE TO ANSWER DAMAGES OUT OF HIS OWN ESTATE." The particular object of this provision was evidently to guard executors and administrators against being held to a personal liability to pay debts, legacies, or distributive shares, in consequence of wilful or mistaken perversion of expressions of encouragement, which they may have used in conversation with claimants, and which were not justified by the ultimate result of administration of the assets in their hands. For obvious reasons, the cases where this clause has been subjected to judicial construction are but few, when compared with those depending upon that which immediately follows it; but in their limited sphere they present an equal proportion of perplexing questions, and conflicting authorities. As the liabilities to which the two clauses relate, resemble each other in many particulars, and the language of one seems to have been studiously framed, so as to conform as closely as possible to that of the other, it has been often said, but, we think, without due reflection, that they are practically identical, and that this

clause calls for no special examination ; because the rules established for the construction of the second, are generally applicable to the first, treating the estate as the original debtor, and the executor or administrator individually as the collateral promisor. Indeed, the contracts embraced within the provisions of both clauses are frequently called guaranties ; a word correctly describing neither class, and peculiarly inappropriate to those within the first clause, whose terms contemplate only a change in form of a liability already resting upon the promisor.

§ 13. So frequent is this method of treating this clause, that it would almost seem that the impression prevails that it was inserted only from abundant caution on the part of the legislature, the second being practically sufficient, with, perhaps, a slight change of phraseology, to cover the cases embraced within both. . There is, indeed, a close similarity between some of the principles, by which promises are withdrawn from the operation of one and the other, occasionally amounting to a coincidence. The latter is complete with respect to the cases which are taken out of the statute, because they fail to satisfy some word of the phrase, "any special promise to answer." As this phrase is to be found in both clauses, those cases wherein it has been decided that the second is not applicable for that reason, are very conclusive precedents to show that the first would not be applicable under similar circumstances. And there is a class of cases under the second clause, not appearing to depend upon its wording, which bear a very close resemblance, with respect to the principle which governs them, and the facts calling for its application, to a corresponding class under the first clause. We refer to those where a promise to pay the debt of another is held to be good without a writing, because the promisor held a fund proceeding from the debtor, and applicable to the fulfilment of the promise ; in contemplation of which the promise was made. The similarity in the situation of the promisor, under such circumstances, and that of an executor or administrator, having sufficient

assets to pay the debt of the decedent, and who, in consideration thereof, verbally undertakes to pay it, is very striking. And the principle upon which each description of promises has been held to be without the statute, is substantially the same. For while the first clause expressly provides that it shall be applicable only to a promise by the executor or administrator, to answer damages "out of his own estate," the second manifestly has the same meaning, with respect to a liability incurred by one person to answer for the debt, default, or miscarriage of another. And the courts, construing the second clause as if these words, used in the first, were incorporated therein, have thereupon held, in deference to its supposed intent, that where the real debtor's property would ultimately reimburse the promisor, the result was the same as if the debt was not to be paid in the first instance out of the latter's means.

§ 14. But the principles governing many other descriptions of cases, arising under the second clause, while they appear at first sight to be equally applicable to similar cases arising under the first, will be found, upon close examination, to depend upon features wherein the two classes of cases radically differ. The point of difference is generally dependent upon the fact that although in each class three interests are represented, questions can properly arise for decision under the second clause, only where the transaction concerns *three persons*, and under the first only where it concerns *two persons*. (a) For while the person who undertakes to answer for the debt of another, becomes liable only by virtue of his promise, the executor or administrator is already liable, in his representative capacity, for the payment of debts, legacies, or distributive shares; and property to which he has a complete legal title is already sub modo pledged for that purpose.

(a) Meaning, of course, that all persons jointly interested, or interested in subordination to a party to the contract, are counted, with such party, as one person.

And it will be shown in the course of the observations hereafter to be made upon the second clause, that a very large proportion of the cases under it, constituting several distinct classes, with many subdivisions presenting nice shades of distinction, depend upon corollaries derived from the general principle that a promise to pay a debt for which the promisor or his property was already liable, is not within the intent of the statute, although it is within its terms. But where the promisor is an executor or administrator, this is the precise case where the first clause unequivocally provides that he shall not be liable without a writing. Again, the reasons why certain other classes of promises are taken out of the statute, as not being within the second clause, may be most satisfactorily found in a peculiar signification given to some portion of the phrase "debt, default, or miscarriages of another person;" as, for instance, that numerous class where the original debtor was discharged, before the new promisor became liable. In all such cases it is manifest that the grounds of the exclusion of one class from the statute, are entirely inapplicable to the other, and any attempt to assimilate the two will only mislead. Hence the proposition that the difference between the first and second clauses is only of a formal character is a fallacy; the dangerous character of which is the greater, because, owing to the confusion which exists in many classes of cases arising under the second, it is not always immediately obvious, when such was the fact, that particular decisions turned upon principles inapplicable to cases arising under the first.

§ 15. And the supposed analogy between the two clauses has actually given rise to serious errors of this precise character, which not only have appeared in the elementary books, but occasionally have crept into the judgments of the courts, to the extent of obscuring the real point at issue, when they have not led to erroneous decisions. (b)

(b) In a work which has received very high encomiums, where it is said that the distinction between the first and second clauses is more technical than substantial, and that both descriptions of contracts are guaranties, the

§ 16. The first clause of the fourth section was therefore inserted, not from abundant caution, or as a mere amplification of the second; but to include undertakings of an entirely different character, and not amenable to the same

proposition is laid down, in discussing the corresponding rule under the second clause, that where the estate is discharged in consideration of the executor's or administrator's promise to pay a creditor of the decedent, the promise is not within the statute. As authority for this proposition, three cases are cited; one of which is *Harrington v. Rich* (post, § 38), and the other two hold that the discharge of the estate is a good consideration for an executor's written undertaking, even if there were no assets. The proposition itself is believed to be irreconcilable with the spirit as well as the letter of the statute, and to proceed solely from the confusion to which we have referred. With great deference to the learned tribunal which decided the case of *Templetons v. Bascom*, 33 Vermont, 132, (cited fully in chapter seventeenth), it appears to us that it presents another instance of the same species of confusion, although without leading to an erroneous conclusion. It was decided upon the hypothesis that the question arose under the second clause, and the decision has consequently provoked considerable criticism; whereas, if we err not, that clause had no connection with the case. The defendant, the only child of a man who had died intestate, leaving an estate more than sufficient to pay his debts, promised orally to pay a debt of the intestate to the plaintiffs in consideration of forbearance against the estate. The promise was repeated several times, before as well as after administration was granted to the defendant; and the court held that the promise was not within the second clause, by reason of the defendant's interest in the property. But none of these were promises to answer for the debt of *another person*; for before administration was granted there was no debtor, and afterwards the defendant himself, in his representative character, was the debtor. According to *Tomlinson v. Gill, Ambler*, 330, (post, § 18), the promises made before administration granted were not within the first clause of the statute; and according to *Ridout v. Bristow*, 1 Crompton and Jervia, 231, as explained by *Serle v. Waterworth*, 4 Meeson and Welsby, 9, and *Nelson v. Serle*, id. 795, the forbearance was a sufficient consideration to sustain them; for although not administrator, the defendant was entitled to administration. The promises made after administration granted, were not within the statute, under the rule laid down in *Stebbins v. Smith*, 21 Massachusetts (4 Pickering) 97, and *Pratt v. Humphrey*, 22 Connecticut, 317, post, §§ 26 and 28. Apparently, *Kershaw v. Whitaker*, 1 Brevard (South Carolina), 9, A. D. 1794, was also a case where the two clauses were confounded, the confusion resulting in an erroneous decision. In *Harrington v. Rich*, 6 Vermont, 666, post, § 38, there was a misapplication of the principles governing the second clause, to a case exclusively under this clause: but it did not result in any error. And see *Hackleman v. Miller*, post, § 35a.

rules, although possessing considerable outward resemblance to those embraced within the other. It is quite possible for cases to occur, where the facts apparently bring the same promise within the terms of both clauses, and then questions arise under both ; but this is merely accidental, and it is matter of every day occurrence for several legal propositions, having no necessary connection with each other, to be presented upon the same state of facts.(c) But cases where it is at all doubtful upon which clause of the statute the validity of a verbal promise depends, are exceedingly rare ; indeed, we have met with none, where, if the report is not imperfect, a careful examination will not remove all such doubts. From inadvertence, some confusion has arisen upon this point, where the original debtor had deceased, and no letters testamentary or letters of administration had been granted at the time when the defendant undertook to pay the debt. It has been occasionally assumed that a promise made under such circumstances was in terms a promise to answer for the debt of another ; and if it could be saved from the operation of the statute, when it was verbal, some rule construing the second clause, according to its spirit rather than its letter, must be invoked for the purpose. But it is believed that if any question arises in such a case, it is whether the first clause is applicable. The promise was not to answer for the debt of *another person* ; for there was no person who owed the debt, either individually or in a representative character ; and if the facts are not such as to raise any question under the first clause, it seems very clear that the statute does not apply at all.

§ 17. In cases of this kind, a question of considerable nicety sometimes arises, which will now be examined. It is presented where the promisor was the executor named in the will of the original debtor, but no letters testamen-

(c) *Chandler v. Davidson*, 6 Blackford, 367 ; *Pratt v. Humphrey*, 22 Connecticut, 317, are cases where questions fairly arose under both clauses.

tary had been issued to him when the promise was made; or where, the debtor having died intestate, the promisor was appointed administrator of the estate after the promise was made. And a distinction has been taken between the verbal agreement of an executor and that of an administrator to pay the debt of the deceased person, when it was made before the granting of letters. It has been said that as an executor derives his title from the will of the deceased, and the interest and office are completely vested in him at the instant of the testator's death, (the probate and grant of letters being the authentication and not the origin of his title,) his promise is necessarily within the statute, whether it is made before or after probate; whereas the administrator derives his office and title exclusively from the award of letters, and consequently a promise by him, before the award of letters, is merely that of a person who expects to represent an intestate, and for that reason not within the statute.(d)

§ 18. This doctrine is supposed to be derived from the equity case of *Tomlinson v. Gill*, Ambler, 330, A. D. 1756. There, according to Mr. Ambler's report, the defendant, previous to his appointment as administrator, had promised the widow that, if she would permit him to be joined with her in the letters of administration, "he would make good any deficiency of assets to discharge the intestate's debts." A bill was filed by creditors of the intestate against Gill "for a satisfaction of their debts and performance of the promise," and it was insisted on the part of the defendant, that the promise, not being in writing, was void by the statute of frauds. But Lord Hardwicke said that there were two questions, one on the right and the other on the remedy. That the case was not within the first branch of this section of the statute, "for Gill was not administrator at the time of making the promise, and it is no answer to say that he was administrator afterwards." That it was not within the second

(d) Roberts on Frauds, 201; 3 Parsons on Contracts, fifth edition, 19.

branch because there was "a new distinct consideration." The equitable jurisdiction was sustained upon the ground that an action at law could not be maintained, because the promise was made to the widow; but it was a proper case for equity, because the promise was for the benefit of the creditors, and the widow was a trustee for them. His Lordship added that the bill was for an account, "and that draws to it relief like the common case of a bill to be paid out of assets;" and accordingly he decreed, not merely an accounting, but payment of the debt.^(e)

§ 19. In this case, it was only necessary, in order to dispose of the objection arising under the second clause of the statute, to say that as the original debtor had died intestate, and no administrator had been appointed when the promise was made, there was no one in being to whom the expression "another person" could possibly apply; and the reason in fact assigned by Lord Hardwicke, is believed to be entirely exploded at the present time. With

(e) It is said by Lord Northington, in *Griffith v. Sheffield*, 1 Eden, 73 (see page 77), that the defendant Robert Gill was the father of the intestate. Mr. Ambler's notorious inaccuracy (*Marvin's Legal Bibliography*, p. 58; Preface to 1 Eden's Reports; Preface to Blunt's Ambler;) would seriously interfere with the authority of this case, if Mr. Blunt had not verified it, by his examination of the original roll. It appears from his note that the widow and Robert Gill took out letters jointly; that the bill was filed against them both, and that the decree declared the creditors to be entitled "to have the benefit of the contract, entered into by the defendant Robert Gill with the defendant Catharine Gill, before taking out letters of administration;" and accordingly there was a decree that an account should be taken of the debts of the intestate, and the property received by the defendants; and after applying the personal estate, "that the defendant Robert Gill do pay to the plaintiff, and the several other creditors of the intestate, so much money as the personal estate should fall short to answer their several debts respectively." So that, although some of the remarks attributed to Lord Hardwicke in the commencement of his opinion, would seem obscurely to indicate that it was an "argument" (agreement) that a specialty creditor should have administration, on terms of paying all the debts, *pari passu*, there is but little room for doubt, that whatever inaccuracy the report may contain lies in what Lord Hardwicke is made to say, *arguendo*; the facts and the decision being very accurately stated.

respect to the application of the first clause, his Lordship's reasoning seems to be quite unanswerable. In an action at law, founded upon a verbal promise to pay the debt of a decedent, it would appear that the objection that the promise was within this clause of the statute would entirely fail, if the defendant could not show that he was administrator at the time when the promise was made, because it would be impossible to frame a good special plea, setting forth the facts upon which it was insisted that the statute avoided the promise, without making that allegation in a traversable form. Upon a principle, in all respects analogous, it is held that the validity of a promise, under the second clause, depends upon the facts existing at the time when it was made, and cannot be affected by events subsequently occurring. (f) And the fiction of law by which the administrator's appointment is allowed in some cases to relate back to the death of the intestate, is by no means of universal application; and where it is admitted it appears to be allowed for the benefit of the estate. (g) It ought not, therefore, to be used for the mere personal benefit of the administrator, in such a way as to prevent the real facts from being shown.

§ 20. But there is nothing in Lord Hardwicke's decision to warrant the conclusion that an executor's verbal promise to pay a debt of the decedent is void under the statute, if probate of the will had not been granted when it was made. If such is the rule of law, it results from principles not discussed in *Tomlinson v. Gill*. And possibly it may be found upon examination, that the distinction supposed to exist between the promise of an executor and that of an administrator may correctly be characterized as "a very slight and cobweb distinction;" an epithet which Lord Hardwicke very unjustly applied to the principle established in *Burkmire v. Darnell*, 6 Modern, 248,

(f) See section 152.

(g) 1 Williams on Executors, sixth edition, 392, 393; and *Morgan v. Thomas*, 8 Exchequer, 302, there cited.

now universally acknowledged to be a correct test of the application of the second clause.

§ 21. It is very true that the doctrine that an executor derives his authority from the will, and an administrator from the grant of letters, enables an executor to do many things before probate, which an administrator cannot regularly do until letters have been issued to him ; such as paying, collecting, and releasing debts due to and from the estate ; taking possession of, selling, or otherwise disposing of the personal property ; assenting to or even paying legacies ; in short doing almost any act, except maintaining an action ;(h) and he may even do that, provided he obtains probate before declaring, so as to be able to make profert of letters in the declaration. But it is believed that this is one phase of the principle of relation back to the death of the intestate, which is allowed for the benefit of the estate, and not of the executor or administrator individually. It is very evident that the executor does not derive his office wholly from the will ; his own assent is a necessary ingredient to its perfection ; and if he should renounce, never having done any act of acceptance, it is believed that his verbal promise to pay a debt of the testator, made before actual renunciation, could not, upon any sound reasoning, be brought within the statute. It is therefore quite possible that if the question shall be presented directly for decision, it may be found that the same principle upon which *Tomlinson v. Gill* was decided, or an analogous principle, will sustain an executor's verbal promise to pay a debt of his testator, if there had been no probate of the will at the time when it was made.

§ 22. In many, and probably in most of the United States, the distinction between the powers of an executor and those of an administrator, before the grant of letters, has been to a great extent obliterated by various statutory

(h) Bacon's Abridgment, title Executors and Administrators, E. 14 ; Wentworth's Office of Executor, 14th edition, 81 et seq. ; 1 Williams on Executors, 6th edition, 291 et seq.

provisions, which require an executor to prove the will, qualify (by taking an oath and sometimes also by giving a bond), and take out letters, before he is authorized to act in that capacity. And whatever may be the correct rule, where the common law powers of executors have not been taken away, it would seem that where such enactments prevail, the two classes of personal representatives should stand upon the same footing, with respect to promises made before the actual grant of letters. That their powers and privileges are substantially the same, appears from the decision in *Thomas v. Cameron*, 16 Wendell (New York), 579, A. D. 1837. There it was held that, under the provisions of the Revised Statutes of New York, requiring executors to qualify, and forbidding them to interfere with the estate, except for its preservation, till they had procured letters, they could not maintain an action before the actual grant of letters. The court said, "If they" (the plaintiffs suing as executors) "were not executors at the time the suit was commenced, letters subsequently obtained would not aid them by relation. The statute has introduced a new rule, by taking away the common law right to sue before probate." And accordingly a plea, that the plaintiffs were not executors at the time of the suit, was sustained on demurrer, although the declaration made profert of letters. And in another New York case, *In the matter of Faulkner*, 7 Hill, 181, A. D. 1845, where certain moneys belonging to the estate of a testator had been received, before probate, by Faulkner, who was named as executor in the will; and who, after probate and grant of letters, was proceeded against as an absconding debtor; the question was whether the co-executor was entitled to a preference in payment by the trustees, under a statute providing for such preference, in case of a debt owing by the debtor as executor. The trustees having refused to allow the preference, a motion to direct them to allow it was granted, upon the principle of relation back to the death of the decedent, which obtains in case of an administrator acting before grant of letters. Bronson, C. J., said, "The objection urged against this claim is that

as Faulkner had not then qualified, he was not executor at the time the money was received. But the answer is that when Faulkner qualified as executor, his authority related back, and legalized the payments which had been previously made to him. He afterwards held the money, and it was a debt against him as executor."

ARTICLE II.

When a general promise by an executor or administrator to pay a debt of the deceased is without the statute, because it is not to be fulfilled "out of his own estate."

§ 23. It has been said that a promise by an executor or administrator, in his representative capacity, to pay a debt of the deceased, is a mere nudum pactum if he has no assets, and if he has assets, that the extent of the promise is measured by the extent of the assets, "or, in other words, the promise superinduces no obligation upon the original representative liability." (a) But whatever may be the legal effect, or the consequences to either party, of such a promise, apparently it is entirely unaffected by the statute of frauds. This would seem to be clear, although occasionally the distinction has not been noticed, (b) from the fact that the language of the statute expressly confines its application to a promise "to answer damages *out of his own estate*." Indeed a question might arise, whether these words would be satisfied by any thing except an undertaking which in express terms bound the promisor to apply his own means to its fulfilment; and consequently whether a general promise to pay, although it might enable the promisee to maintain an action against the promisor individually, and thus obtain a personal judgment against him, was within the statutory provision. But it appears to have been assumed by common consent, that in that respect the form of the promise is immaterial. It may therefore be stated, as a

(a) Roberts on Frauds, page 207.

(b) As in *Hay v. Green*, 66 Massachusetts (12 Cushing), 282, post § 45; and see §§ 46 to 48.

general rule, that no verbal special promise of an executor or administrator to pay any demand for which he is liable only in his representative character, will sustain an action against him individually.

§ 24. However, some American authorities, entitled to great respect, hold that an exception to this rule arises where the promisor was possessed of assets of the estate, applicable to the fulfilment of the promise. We find no trace of this exception in England; for although there are some English cases holding that the possession of assets is a sufficient consideration for the promise of an executor or an administrator to respond personally, it does not appear that the courts of that country afford any sanction to the idea that it is thereby taken out of the statute.^(c) And it is difficult to determine, upon either principle or authority, at what period of time it must appear that the assets existed, in order to create the exception recognized by the authorities referred to: that is, whether it will suffice to show that at the time of the promise there were assets; or whether they must be still in existence and applicable to its fulfilment, at the time of the trial. The embarrassment in settling the question upon principle, grows out of the fact that the doctrine itself rests upon questionable reasoning. In general terms, it may be said to depend upon the idea, that if the executor or administrator has the means to discharge the liability out of the estate, the promise will not be ultimately fulfilled out of his own property, although such may be the immediate effect of the judgment against him. And in order to give full effect to this reasoning, it is quite clear that there must be sufficient assets in his hands at the time of the trial: and consequently it would seem that proof that such was

(c) 2 Williams on Executors, 6th edition, 1646, 1647, citing *Réech v. Kenneal*, 1 Vesey, Sr., 126; *Atkins v. Hill*, Cowper, 284; *Hawkins v. Saunders*, id. 289; per Lord Cottenham in *Barnard v. Pomfrett*, 5 Mylne and Craig, 71; *Trewinian v. Howell*, Croke Elizabeth, 91. But see *Rann v. Hughes*, 4 Brown's Parliamentary Cases, 25, and 7 Term Reports, 350, note, cited at length, ante, § 10 and nota.

the condition of the estate at the time of the promise, is material only as raising a presumption that it continues to be in the same condition, which the defendant is at liberty to disprove. And if in fact there are no assets at the time of the trial, which are applicable to the payment of the plaintiff's demand, it is difficult to discover any ground upon which the plaintiff can recover, whether the deficiency has been caused by the discovery of prior claims, or by the loss of the assets, even by a subsequent devastavit of the defendant. This leads to the anomaly of avoiding an unconditional promise, valid at the time when it was made, by the subsequent act of the promisor, to which the promisee was no party: and practically renders the promise to respond individually, equivalent, for most purposes, to a promise to respond in a representative character. But if it be said that the legal effect of the promise is that the promisor undertook to apply the assets then in his hands to the payment of the plaintiff's demand, so that he is responsible in damages for its breach, if they are for any cause applied otherwise, this would cover a case where they subsequently became deficient, even without the fault of the promisor, and thus expose him "to answer damages out of his own estate."

§ 25. There is also great obscurity upon another important point in the same connection, namely, whether the assets must suffice to discharge all prior claims upon them, and all other claims standing upon the same footing as that of the promisee. Upon the plainest principles, there should be no doubt upon the first branch of this proposition; for if the fund was liable to be exhausted by claims having a preference, the whole reasoning, whereby the promise was taken out of the statute, falls to the ground. But suppose that after paying prior claims, the fund would have sufficed only to pay a dividend to the promisee, and all others having claims of equal degree. Manifestly the recovery ought to be limited to the amount of the dividend. But if the promise is to be construed, according to its terms, as an absolute engagement to pay

the debt, how can the damages for its breach be reduced below the actual damages sustained by the promisee? These do not depend upon the amount of the dividend to which he would be entitled; that is only an element by which to measure the loss which the promisor sustains in consequence of his promise. So that it would appear that for this reason also, a verbal promise to respond personally is only practically equivalent to a promise to respond in a representative character, except for the purpose of avoiding some statutory bar to the maintenance of the action, in consequence of lapse of time. And it is easy to see that if the promise of the executor or administrator will have that effect, cases will sometimes arise where he will either be compelled to respond out of his own means, or else to deprive other creditors of a preference to which they have acquired a legal right. (d)

(d) Some of these difficulties pressed upon the mind of the court in *Moar v. Wright*, 1 Vermont, 57, A. D. 1826, in the examination of the question whether the possession of assets, more than sufficient to pay all the debts and legacies, was a sufficient consideration for an executor's promise to pay a debt of his testator to an assignee thereof, upon which an action could be maintained to charge the defendant *de bonis propriis*. The point was whether the declaration, which contained those allegations, was sufficient to enable the plaintiff to sustain a demurrer, which he had interposed to an insufficient plea; and the court, with considerable hesitation, decided the question in the affirmative, laying stress, however, on the fact, that as the plaintiff was an assignee of the debt, there was already an equitable obligation on the part of the defendant to pay him, which formed an essential ingredient of the consideration. In the course of the opinion, Royce, J., said that *Forth v. Stanton*, 1 Saunders, 210, was distinguishable from this case, because there the allegation was that the debt was 100*l.*, and that the defendant had received assets to the amount of 100*l.*, but it was not alleged "that at the time of making the promise to the plaintiff, she had assets legally applicable to that demand;" so that the promise, if enforced, might have subjected her to personal loss; and he added: "A difficulty has been started, by supposing that before the execution of the promise, the defendant had died, or had been removed from the office of executor. To this the following answer would seem sufficient. If upon accepting the personal undertaking of the executor, the creditor discharged the estate, the promise would remain in force, and the estate would be holden to refund the sum paid upon it; and if no discharge was given, the promise might become invalid, when the fund which

§ 26. The subject is full of difficulties, and the decisions do but little towards removing them. The whole of this doctrine appears to derive its origin from the case of *Stebbins v. Smith*, 21 Massachusetts (4 Pickering), 97, A. D. 1826. The declaration contained a count upon an insimul computation, and the other money counts; and on the trial it was proved that the defendant and one Alexander Smith were residuary legatees and executors of Jonathan Smith; that they gave a bond to the judge of probate to pay the debts and legacies of the deceased; that afterwards the plaintiff and the defendant made an examination of the plaintiff's demands against the estate, and found \$1,186 to be due to the plaintiff, which the defendant agreed to pay, and then gave the plaintiff his negotiable note for \$1,286, payable on demand, with interest; and that the plaintiff then discharged the accounts and gave up the notes which he held against the deceased. It was admitted "that the defendant received some estate by devise from the deceased," and that the note for \$1,286 had been avoided by him on account of usury. Under the directions of the judge, the jury returned a verdict for the plaintiff, upon which judgment was rendered after hearing the exceptions. Wilde, J., delivering the opinion of the court, said that the note appeared to have been given subsequent to the promise, and that fact was established by the verdict: that the note would have discharged the debt and the promise had it not been avoided; but the avoidance restored the plaintiff to his former demand; that the discharge of the accounts and notes against the deceased was a sufficient consideration for the promise, the defendant being bound to pay them, as he had given a bond in place of returning an inventory; and that this discharge would be sufficient even if it had not extinguished the plaintiff's remedy on the bond, which appeared

made its principal consideration, was taken out of the promisor's hands." In this case there could be no question under the statute of frauds, as the Vermont act was not passed till after the promise had been made; but had it been then in force it would not have affected the result, inasmuch as the pleadings did not show that the promise was verbal.

to be its legal effect. He added: "The suggestion that the promise is void by the statute of frauds is clearly unfounded. It is not a promise by an executor to answer damages out of his own estate; for the bond given to the judge of probate is an admission of sufficient assets which the defendant is estopped to deny."

§ 27. But only four years afterwards, we find the same court, in *Silsbee v. Ingalls*, 27 Massachusetts (10 Pickering), 526, A. D. 1830, giving utterance to a dictum apparently in conflict with the principle upon which *Stebbins v. Smith* was taken out of the statute; and the question does not seem to have arisen again in that state.(e)

(e) This was a bill in equity filed against an administratrix, wherein the plaintiff alleged, that she had repeatedly promised to pay a debt due by her intestate to the plaintiff, admitting that she had assets to pay all the debts; and that in consequence of relying upon the promise, the plaintiff forbore to prosecute for the debt, till it was barred by the statute of limitations. It was further alleged, that she obtained an order from the judge of probate to sell certain real estate of the intestate, in order to pay his debts, which had been sold accordingly, and the proceeds paid to her; that before and after the sale she had promised to pay the plaintiff out of the proceeds; and that she had rendered an account to the probate court, in which she had credited herself with the amount of the plaintiff's debt. Upon the whole case made by the bill, it was insisted that she had become a trustee of the proceeds of the sale for the plaintiff, and the plaintiff prayed for relief accordingly. There was a demurrer to the bill, which the court sustained on the ground of want of equity, because the plaintiff once had an adequate remedy at law, and the intervention of the statute bar did not make the demand the subject of equity jurisdiction. But the court added: "It is alleged, however, that there was a promise by the defendant to pay the plaintiff. But such promise, not being in writing, is within the statute of frauds; and if it were in writing, it would only prove that there is an adequate remedy at law." This doctrine is of but little weight against the authority of *Stebbins v. Smith*, if that case really holds that the possession of assets is sufficient to take the executor's promise out of the statute. But there the defendant had already made the debt his own, by giving the bond; and the language of the court may be referable to the fact that he was bound to pay the debt out of his own estate, independently of the verbal promise. This would make the analogy perfect between this case and one arising under the second clause, where the defendant, before making the promise,

§ 28. In *Pratt v. Humphrey*, 22 Connecticut, 317, A. D. 1853, the action was against the defendants in their individual capacities, and the plaintiff declared on their promise to pay a certain sum, in a manner mentioned in the declaration, in consideration of the plaintiff's forbearance to present to them as administrators, for allowance and payment, within the time fixed for that purpose by the judge of probate, a debt due to him by their intestate; whereby under the law of Connecticut the debt was lost. The defendants pleaded that there was no writing within the statute of frauds, to which plea there was a demurrer. The demurrer was overruled in the court below, and the defendants brought error to this court, where the judgment was affirmed. In deciding the question which we are now considering, the court, Storrs, J., delivering the opinion, said: "If the defendants are not to be deemed to have assets of the estate which they represent, it would be a very embarrassing question, whether this promise is within the first branch of the statute of frauds, which relates to a 'special promise' (by an executor or administrator) 'to answer damages out of his own estate.' In that case it would be difficult to resist the claim, that it is a promise to answer damages out of their own estate. But if they are to be considered as having such assets, they would have a right to charge to the estate they represent, the amount of the damages recovered of them in this suit, and it would seem, therefore, that those damages would not come out of their own estate. They would not, ultimately at least, although they might in the first instance. For, although the judgment would be against them personally, they would be indemnified against it, by the funds of the estate in their hands. Hence the damages would substantially be answered out of the estate of their intestate; and

had received a fund from the debtor for the purpose of paying the debt. There can be no doubt as to the general principle that a bond for payment of debts and legacies conclusively admits assets. It was so ruled again in *Colwell v. Alger*, 71 Massachusetts (5 Gray), 67, A. D. 1855, an action by a legatee against an executor and residuary legatee for a general legacy and the value of a specific legacy.

the promise, in such case, would appear to be one which was not contemplated by that branch of the statute." After stating the substance of the case of *Stebbins v. Smith*, the learned judge proceeded: "The principle determined in that case is, that where an executor or administrator has assets, a promise by him to pay a debt due by the person he represents, is not within that branch of the statute. We are induced, although not without some hesitation, to adopt the same construction. Whether he would be liable on such promise, beyond the amount of such assets, it is not necessary to decide; the question before us is as to the right, and not the extent of the recovery." (f)

§ 29. The doctrine, that the possession of assets will suffice to render the statute inapplicable, seems to rest entirely upon the authority of *Stebbins v. Smith* and *Pratt v. Humphrey*; (g) and in view of the doubtful character of the reasoning by which it is sustained, and the difficulties to which its practical application will lead, they are hardly sufficient to establish it as a settled rule of American jurisprudence. It finds, however, a very close analogy, as was stated in the preceding article, in

(f) The court proceeded further to determine that, upon the pleadings before them, the presumption was that the defendants had assets, and if the fact was otherwise, they should have expressly averred it. It was held, that, upon the principle adopted by the court, the mere fact that there was no note or memorandum, etc., in writing, did not necessarily or even *prima facie* bring the case within the statute, because the declaration was complete, without stating the fact that the defendants were administrators; which was properly matter for them to allege in their plea, in order to enable them to raise the defence of the statute. The effect of the plaintiff having stated that the defendants were administrators, was merely to relieve them of the necessity of so stating in their plea; they must still set forth "such facts and circumstances as amount to a complete defence," one of which was that, as administrators, they had not assets enough to pay the plaintiff's demand. There was still another question arising under the second clause of this section of the statute, with reference to which the case is again cited in a subsequent section.

(g) And see *Collins v. Row*, 10 Leigh, 114, cited in § 47, and comments thereon in § 48, post.

the principle that when the promisor controls a fund proceeding from the debtor, applicable to the fulfilment of the promise, and in contemplation of which the promisor undertook to pay an antecedent debt of a third person to the promisee, the case is not within the second clause of this section. But in some of the phases which that principle assumes, it is sustained upon the idea, that by the receipt of the fund the promisor became liable, in some form, to pay the debt out of his own means, independently of the promise; whereas the duty of an executor or administrator is always confined to the legal appropriation of the fund in his hands. Still, if the amount of the recovery is limited to the amount of assets in the hands of the defendant, applicable to the payment of the plaintiff, there is no greater violation of the intent of the statute in one case than in the other, whatever may be the embarrassments in reconciling such a limitation with other principles. But it is quite remarkable that this doctrine should rest entirely upon decisions in Massachusetts and Connecticut. For the courts of the former state stand alone, among all those in the United States which have spoken upon the subject, in repudiating the analogous doctrine arising under the second clause;^(h) and the Supreme Court of Connecticut, although it has not directly decided the point, has nevertheless, in a recent case, intimated an opinion the same way, and expressed its satisfaction with one of the Massachusetts decisions, where the rule has thus been laid down.⁽ⁱ⁾

§ 30. There are a few cases in other states, the tendency of which is towards the contrary doctrine, although they are not at all decisive upon either side of the question.^(j)

(h) *Curtis v. Brown*, 59 Massachusetts (5 Cushing), 488, and *Furbish v. Goodnow*, 98 Massachusetts, 296.

(i) *Clapp v. Lawton*, 31 Connecticut, 95, approving *Curtis v. Brown*.

(j) In *Harrington v. Rich*, 6 Vermont, 666, cited in § 38, it is very probable that the defendant had some assets out of which a dividend could have been made on the plaintiff's demand; but the report does not so expressly state, and the declaration contained an averment that the estate was "represented

In *Chandler v. Davidson*, 6 Blackford (Indiana), 367, A. D. 1843, the plaintiff sued upon a verbal promise made by the female defendant, before her marriage with the other defendant, to pay a debt due to him by her deceased husband. It appeared that the first husband died in North Carolina, having bequeathed his property to his wife, and an administrator with the will annexed was then appointed, who sold the personalty. The widow removed to Indiana, bringing with her some personal property, part of which she said had been bought with means derived from the estate, and part of which formerly belonged to her husband, but it did not appear how she acquired title to it. Soon afterwards she made the promise upon which this suit was brought. The plaintiff having recovered in the court below, an appeal was taken to the Supreme Court. The opinion, after stating that the facts showed no reason why the promise was not within the second clause of the fourth section, proceeded: "The plaintiff further says, that the wife may be viewed as an executrix de son tort, on the ground of her having wrongfully taken possession of some of the goods, and brought them to this state; and that her express promise, therefore, would support the suit. But assuming her to have been such executrix, and that she would have been bound in her own right, in consideration of assets, were the promise in writing, to pay the debt in question, still there can be no doubt, we think, that the parol promise was not obligatory on her personally. The having assets was not of itself sufficient to render the promisor liable to a suit in her own right." For these reasons, as well as upon a technical objection to the pleadings, the judgment below was reversed. But it may be doubted whether the clause applies to an executor de son tort. (k)

to be insolvent." The point whether the possession of such assets would sustain the verbal promise, either to the extent of the plaintiff's proportion, or for the full amount of the debt was not taken. And see *Robinson v. Lane*, 14 Smedes and Marshall, 161, in the note at the end of this article.

(k) In this case a question was fairly presented whether either clause applied: the first, because the widow was entitled to administration in Indiana; the second, because it was a debt due by the North Carolina administrator.

§ 31. From the ruling in *Sidle v. Anderson*, 45 Pennsylvania, 464, A. D. 1863, it would appear that if the doctrine under examination enunciates a correct rule of law, it is essential to its application to show possession of assets by the promisor at the time of the promise ; and although the executor or administrator might be ultimately made liable to pay the demand out of his property, in consequence of a previous devastavit, no action will lie on an express verbal promise founded upon that consideration. This action was to recover upon certain notes of the defendants, and the only question material here, was whether a set-off was properly allowed. This arose upon a sealed order, executed by the plaintiff's son, directed to one Morrison, and requiring him to pay a certain sum to one of the defendants, which Morrison had refused to accept or pay. The plaintiff was the administrator of his son's estate ; and, as the son had died without issue, he was entitled by law to half the property, after payment of debts, the other half belonging to the widow ; but he had settled his administration account in ignorance of the defendants' claim, and had paid the whole to the widow without taking any bond to refund. Afterwards, as the jury found upon the evidence, he promised to settle or pay the order, by applying it upon the notes in suit. Under the instructions of the judge at the trial, that the promise was not within the statute of frauds, the jury allowed the set-off. The judgment upon this verdict was reversed in the Supreme Court upon a writ of error. The opinion, delivered by Thompson, J., commenced by discussing the question whether the order imported an indebtedness on the part of the son to the payee, upon which point he concluded, that, as it was under seal, and not negotiable, and did not purport to be for value received, it was not alone sufficient evidence to charge the plaintiff with the amount. The opinion then proceeded to consider the question arising under the statute of frauds. After saying that the proof of payment to the widow, without a refunding bond, was introduced to establish a devastavit, the learned judge continued : "It was, therefore, not possible to claim that the promise was

made on account of assets. The proof showed there was none. But it rested upon the supposed proof of a devastavit, which it was assumed was the consideration for the promise to pay the order. If there was a promise by the administrator to be personally liable, it had no other consideration than that implied in the allegation of an existing devastavit. There was no express promise to pay on any such ground, and the case of *Wilson v. Long*, 12 S. & R. 58, very clearly determines that no implied contract to pay arises out of a devastavit. This would be decisive of the case on grounds independent of the statute. But suppose the promise rested on this ground expressly. It would be a promise by the administrator to 'answer the damage out of his own estate,' for 'the debt of another;' and this would certainly be within the statute, and not binding for want of writing to that effect."

§ 32. In *Okeson's Appeal*, 59 Pennsylvania, 99, decided A. D. 1868, it was held that an executor was not liable upon a verbal promise to pay a debt of his testator, beyond the promisee's proportionate part of the assets in his hands, although the question whether the promise created any personal liability, was not properly before the court. This was an appeal taken by Nicholas A. Okeson, administrator of Samuel Okeson, from a decree of the Orphan's Court, reducing a credit in his accounts, for a sum paid to Margaret Okeson. It appeared that Samuel had been the executor of his father's will, by which a legacy of three hundred dollars was given to Margaret; but the assets in Samuel's hands, after payment of debts, were found, upon a settlement of his accounts made in 1843, to be only \$106.95. Samuel died in 1865, without having paid Margaret; but evidence was offered, to the effect that he had orally promised to pay her. Nicholas paid her \$803, being the full amount of her legacy and interest; and the widow of Samuel filed exceptions to this item. It was insisted on the part of Nicholas, that, by the terms of the will, the legacy was charged upon the lands devised to Samuel; but the Orphan's Court thought otherwise, and

reduced the credit to Margaret's pro rata share, with the other legatees, of the balance found to have been in the hands of Samuel, at the time of the settlement of his accounts. This decree was affirmed upon appeal. The opinion of the Supreme Court, delivered by Sharswood, J., after holding that the legacy was not charged upon the land, proceeded to say that there was no consideration for Samuel's promise, beyond the amount of personal assets in his hands, and that the cases appear to hold that where an executor or administrator promises to pay, in consideration of assets, the consideration and the promise must be co-extensive. "However that may be," added the learned judge, "it is clear that the executor cannot be made liable *de bonis propriis*, on an oral promise, on the mere consideration of assets. That would be 'to charge him upon a promise to answer damages out of his own estate,' and therefore within the Act of April 26, 1855." (2)

(2) It seems to be yet unsettled in England, whether the possession of assets suffices as a consideration to support a promise by an executor or administrator to pay a debt of the decedent, although Mr. Justice Williams inclines to think that it is sufficient, and that if the promise was in writing, he may be sued thereon in his individual capacity, and the judgment will be *de bonis propriis*. 2 Williams on Executors, sixth edition, 1646, 1647. And forbearance to sue him as executor, at his request, is also a sufficient consideration for the same purpose, whether he had assets or not; and hence in declaring upon such a promise, it is not necessary to aver that he had assets. Id. 1642. Consequently a promise by an executor, to pay a debt of the testator at a future day, makes it his own. Id. 1644, 1645. So supplying the executor individually with goods, or delivering up to him deeds upon which the plaintiff had a lien for his debt, forms a sufficient consideration for his individual promise to pay the debt, whether he had assets or not. Id. 1646. The leading American case, respecting the sufficiency of the consideration for an executor's or administrator's undertaking, to respond personally for a debt of the deceased, and his right to defend an action thereon on the ground of want of assets, is *The Bank of Troy v. Topping*, 9 Wendell (New York), 273, A. D. 1832. This was an action against the defendants individually, upon a promissory note payable sixty days after date, executed by them as the administrator and administratrix of the estate of John Topping, deceased. At the trial, the defendants offered to show, that the note in suit was the last of five successive notes, made by the defendants in renewal of a note held by the plaintiffs against the intestate, at the time of his decease; and that the

ARTICLE III.

When this clause of the statute does not apply, because the subject-matter or the form of the promise, does not answer the statutory description of the liabilities embraced within it.

§ 33. The first and second clauses of the fourth section use precisely the same words, to describe the form of the promises, to which they severally apply; and to that extent the decisions under the one are applicable to cases arising under the other. Upon the same authorities and

defendants having, in due course of administration, exhausted the personal property in their hands, obtained from the surrogate an order to sell all the real estate of the intestate, for the payment of debts, which was done accordingly; and one of the credits upon the note consisted of a dividend paid to the plaintiffs, out of the proceeds of the sale. This evidence was rejected, and the plaintiffs had a verdict for the balance due upon the note; which was set aside by the Supreme Court, and a new trial granted upon exceptions. *Savage, C. J.*, delivering the opinion of the court, after examining the previous authorities, concluded that they show that assets in the hands of executors or administrators, constitute a sufficient consideration to support an express promise, which will bind them personally, to pay a debt of the deceased; that forbearance to sue them in their representative capacity, is also a sufficient consideration for the same purpose; and that, inasmuch as a promissory note imports a sufficient consideration, but as between the original parties the consideration may always be inquired into, the note in suit was prima facie evidence of the possession of assets sufficient to pay it; but that the defendants might rebut that presumption, by showing that they had no assets; in which case the note would be void for want of consideration, inasmuch as an agreement to forbear could not be inferred, from the fact that the note was payable sixty days after date. The cause having been tried anew, and the second trial having also resulted in a verdict for the plaintiffs, it came again before the Supreme Court in the year 1835, the decision upon the second argument being reported in 13 Wendell, 557. The conclusions which the court reached upon the former hearing, were reiterated upon this occasion; and in addition it was expressly determined, that the onus of proving want of assets rested upon the defendants, the point not having been necessary to the decision upon the former hearing; the ground taken here being that the note was prima facie evidence of assets, because they are the legal consideration, upon which such a promise ought to be and is presumed to be founded. And in *Robinson v. Lane*, 14 Smedes and Marshall (Mississippi), 161, A. D. 1850, the defendant's testator had assigned to the plaintiff a note given to him individually, and indorsed upon it his written guar

for the same reasons, which exclude from the operation of the second clause implied promises, (a) liabilities which grow out of some act other than a promise, (b) and promises to do some act tending to the discharge of the promisee's demand, other than to pay the same, (c) no doubt similar liabilities could be enforced against an executor or administrator, without written evidence. Neither of these is a "special promise to answer" for any debt; and although this peculiar phraseology has not received much attention in the cases decided under the first clause, there are a few, which seem to present questions arising upon some of these words, or at least are proper to be considered in connection with them.

§ 34. With respect to *implied promises* of executors and administrators, it is quite obvious that the facts upon which the law would imply a promise to respond individually, will very rarely occur. But it has sometimes happened that a liability incurred in a representative capacity, without any express promise, has been enforced by the courts against the individual property of the defendant,

anty of the consideration, but not of the solvency of the makers; and the declaration stated that the plaintiff had sued the makers, and had been defeated, on the ground that the note was without consideration. The defence was, first, that the consideration of the guaranty was a debt due from the estate of one Moore, of whose will the defendant's testator was executor, and that there were no assets of that estate; and, secondly, that the plaintiff's demand against the estate of Moore was not a valid one, and so there was no consideration for the guaranty. The court held that the first defence could not be sustained, because the undertaking was in writing, and so satisfied the statute of frauds, and it was founded upon a sufficient consideration, namely, the discharge of the estate of Moore; and that after the defendant had thus personally undertaken to pay, it was immaterial whether there were assets or otherwise; but, that the second defence was good in law, because it went to the consideration of the guaranty; and the judge, at the trial, having ruled out testimony offered by the defendant, tending to prove that the plaintiff's demand against the estate of Moore was not a just claim, the judgment of the court below was reversed for that reason.

(a) Chapter fourth, article first.

(b) Id., article second.

(c) Id., article third.

upon principles and under circumstances which led to its being practically treated as an implied promise, although it was not so called in terms. As the question whether the executor or administrator had assets applicable to the payment of the plaintiff's demand, has been made the turning point of his personal liability, where the plaintiff relies upon an express promise not in writing; so the cases to which we refer are those where the possession of assets, and a consequent liability to pay the plaintiff, have been inferred from some act other than an express promise, or direct evidence of funds in the defendant's hands.(d) Thus, although the payment by an executor or administrator of interest upon a debt due by the deceased, or even payment of part of the principal, will not generally amount to a conclusive admission of assets,(e) yet payments of interest, continued for a length of time, will be regarded as such evidence; and under certain circumstances they will be deemed conclusive to fix the executor or administrator with a personal liability. And so where the question is whether a legatee is entitled to be paid his legacy.

§ 35. This is well illustrated by the case of *The Attorney General v. Joseph Chapman*, 3 Beavan, 255, A. D. 1840. This was an information against the defendant, who was executor of Daniel Chapman, to compel him to purchase such a sum of stock as would produce 20*l.* per annum for a charity, which it was insisted he had made himself personally liable to do. The charity was first created by the will of one Perkins, who died in the year 1800, having directed his executors to purchase and stand possessed of government stock to an amount sufficient to produce

(d) And in Connecticut, and some others of the United States, it is held that the possession of assets raises an implied promise to pay a legacy, upon which an executor or administrator may be sued in assumpsit. See post § 43

(e) *Savage v. Lane*, 6 Hare, 32, and *Postlethwaite v. Mounsey*, in note to *id.* 33; *Severs v. Severs*, 1 Smale and Giffard, 400; *Cleverley v. Brett*, cited per Buller, J., in *Pearson v. Henry*, 5 Term Reports, 8; *Payne v. Little*, 22 Beavan, 65.

20%. per annum, for that purpose; and making this the first charge on his personal estate, before debts and legacies, which he charged on his real estate, if the personalty should not be sufficient to pay them, after making that investment. He then devised his real estate, so charged, and also bequeathed his personal property to William Chapman and Daniel Chapman, and appointed them his executors. William Chapman died in 1804, and Daniel Chapman in 1820, "having regularly paid the 20% down to the time of his death," but it did not appear whether any investment had ever been made; but no such investment existed. The defendant was a son of Daniel Chapman, who devised his real estate to his other sons, making the defendant his executor. The devisees, considering the 20% a year to be a charge upon the real estate, continued to pay it down to the year 1826; when they refused to pay it any longer. From that time till 1833 the defendant paid it; but after 1833 he refused to pay it. Upon the hearing it was insisted, in behalf of the Attorney-general, that the defendant had admitted assets, and thus made himself personally liable; and in behalf of the defendant that he was entitled to an accounting, and that his liability was limited to the balance of assets of Daniel Chapman possessed by him. But the Master of the Rolls held that the defendant, having commenced six years after the testator's death to pay the 20% per annum, and having continued that payment for seven years afterwards, had ample time to ascertain the state of the assets; and that under the circumstances, this must be deemed an admission of assets; so that he "is no longer entitled to have any account of them, but must be declared to make good the fund." (f)

§ 35a. In *Hackleman v. Miller*, 4 Blackford (Indiana), 322, A. D. 1837, the plaintiff sued as administrator of the estate of one Moffitt, upon a note given for the purchase price of goods of the estate, by one of the defendants, with

(f) See also *Whittle v. Henning*, 2 Beavan, 396; *Attorney General v. Higham*, 2 Younge and Collyer, Chancery, 634; *Corporation of Clergymen's Sons v. Swainson*, 1 Vesey, Sr., 75.

the other as his surety; and the principal defendant filed as a set off an assignment made before the commencement of the action by one Whitmore to him, of a demand against the estate in favor of Whitmore, which had been adjusted by the plaintiff as administrator. It appeared that the defendant, before he received the assignment, was informed by the plaintiff that "it was good," and that if he purchased it he would receive the full face of it, in set off against the note on which the suit was brought. The court below gave judgment for the defendant, and, on error, the question was whether the set off was admissible. The Supreme Court held that the plaintiff was suing in his own right, the words "administrator," &c., being only matter of description; and that the set off, in order to be admissible, must be a demand against him personally: that the question, therefore, was whether the case was within that portion of the statute of frauds, relating to the promise of an executor or administrator, to answer personally for a debt of the estate; that inasmuch as the purchase was made upon the faith of the plaintiff's promise, that the debt should be paid, the transaction was similar, in principle, to one where a bill of exchange had been purchased upon the faith of a promise to accept it, which had been construed to be an original promise to the purchaser, and hence that the set off should be allowed. The judgment of the court below was therefore affirmed. Apparently the first and second clauses of the section were confounded in this case, and we doubt whether the decision can be sustained; but perhaps it may rest upon the ground that there was a *representation*, as well as a promise, or a promise to do something else than to "*answer damages.*" (f)

(f) But in *Hay v. Green*, 66 Massachusetts (12 Cushing), 282, the defendant was present at the auction sale, when the plaintiff purchased the distributive share of one of the sons in the intestate's property, for which the action was brought, and he then "made a statement of the supposed value of the distributive share." After the plaintiff's purchase, and the subsequent settlement by the probate court of the amount of the distributive share, the defendant insisted upon his right to deduct therefrom a sum of money, which

§ 36. The promise must be to the effect that the executor or administrator will "answer damages" to the promisee, that is, that he will pay the demand; and consequently the statute has no application to a promise, the fulfilment of which will not, in whole or in part, discharge the demand, or at least necessarily place the promisee in a position where he can compel the executor or administrator to discharge it. Doubtless it was for that reason that a submission to arbitration of a demand against the estate was held not to be within the statute, in the case of *Alling v. Munson*, 2 Connecticut, 691, A. D. 1818. This was an action brought by an administrator to recover a sum awarded to him by arbitrators, upon submission of a controversy growing out of a claim in favor of the plaintiff's intestate against the defendant; and upon the trial it appeared that the submission was verbal, although the award was in writing. The plaintiff had a verdict, and the defendant moved for a new trial on the ground of misdirection of the jury; and also in arrest of judgment. Upon the argument it was contended, with other objections to the recovery, that the submission on the part of the defendant was void for want of mutuality, or for want of consideration; because, if an award had been made against the plaintiff, he would have been personally liable to pay it, and hence it was a promise to answer damages out of his own estate. But the objection seems to have received but little attention, being briefly referred to in one only of the opinions delivered, and overruled without assigning any reasons for the decision in that respect. Both applications of the defendant were denied. (g)

he had paid several months before the sale took place, by reason of a note signed by the intestate as surety for the son, and he offered to pay the plaintiff the amount of the share, if he would deduct the sum paid upon the note. The court held that the defendant could avail himself of the fact that the offer was conditional, to defeat the action. See the case more at length, post, § 45.

(g) That a submission to arbitration does not amount to an admission of assets, and so subject the administrator to personal liability to discharge the award, was decided in *Pearson v. Henry*, 5 Term Reports, 6, A. D. 1792. This was an action of assumpsit against the defendant as administrator for

§ 37. But, on the other hand, although a verbal submission to arbitration is not open to the objection that it is void because it may result in fixing the executor or administrator with a personal liability, an express promise to pay the award, accompanying the submission, is clearly

goods sold and delivered to his intestate, and the defendant pleaded *plene administravit*. In order to prove assets, the plaintiffs gave in evidence a submission to arbitration made by the defendant as administrator, and an award that a certain sum was due to the plaintiffs from the intestate's estate, but "without saying by whom it was to be paid." The plaintiff was nonsuited, and a rule nisi to set aside the nonsuit was discharged after argument. Lord Kenyon expressly held, and the other judges substantially agreed with him, that the submission to arbitration did not of itself amount to an admission that the administrator had assets; and that the award, as it did not direct the defendant to pay the amount awarded, was not a decision that he had assets. And in *Love, executor, v. Honeybourne*, 4 Dowling and Ryland, 814, A. D. 1824, the cause had been referred by a judge's order to arbitration, and an award had been made against the plaintiff, that a certain sum was due from his testator to the defendant, and that the executor should pay it on a certain day "out of the assets in his hands as executor." On a motion in behalf of the plaintiff to set aside the award, the court held that it was not void for uncertainty, the amount of the debt being ascertained and fixed. And Abbott, C. J., thought that the award left the question of assets open; but Holroyd, J., said that the executor would not be bound to pay, if he had fully administered at the day mentioned. On the other hand it has been repeatedly held that the submission is a reference of the question of assets, as well as of the cause of action; and therefore an unqualified award that the executor or administrator shall pay the sum awarded is conclusive upon the question of assets, and subjects him to personal liability for the amount; so that a plea of *plene administravit*, in an action founded thereon, will be held bad on demurrer. *Barry v. Rush*, 1 Term Reports, 691, A. D. 1787; *Worthington v. Barlow*, 7 Term Reports, 453, A. D. 1797; *Riddell v. Sutton*, 5 Bingham, 200, A. D. 1828. See also, for parallel cases, *Wansborough v. Dyer*, 2 Chitty, 40, A. D. 1815; and *Robson v. —*, 2 Rose, 50, A. D. 1813. The result of these cases would seem to be that a submission to arbitration may result in personal liability to pay the award; because the arbitrators may, if they see fit, take into consideration the question of assets. But, if they determine that the executor or administrator is to pay personally, the result is caused by their determining that he had assets; for which reason, and more satisfactorily, because the submission is not a *promise*, and will not necessarily result in a personal liability, or indeed in any liability, it would seem to be clear that a submission to arbitration is not within the statute. Perhaps the same may be said of a promise to arbitrate.

within the statute. This was one of the features of the case of *Pearson v. Henry*, 5 Term Reports, 8, A. D. 1792; but the court, although they sustained the decision at nisi prius, rejecting testimony tending to prove an undertaking to pay the award, and nonsuiting the plaintiff, made no reference to the statute; and indeed the testimony was apparently offered only for the purpose of showing assets in the hands of the defendant. Lord Kenyon gave no reason for rejecting it; but Buller, J., said that it would not avail the plaintiffs, because the action was against the defendant as administrator.

§ 38. And the question was fairly presented in *Harrington v. Rich*, 6 Vermont, 666, A. D. 1831. There the declaration alleged in substance, that the plaintiff was the assignee of a debt due by one Samuel Rich deceased, of whose estate the defendant was administrator; that, after the expiration of the time allowed by the court of probate for the presentation of claims against the estate, but before the expiration of the period allowed by law, within which the judge of probate might open the commission for the allowance of other claims, the plaintiff applied to him to open the same; that he was about to act upon said application, when the defendant, in consideration that the plaintiff would withdraw it, and would submit his claim to arbitration, promised to pay the demand to the plaintiff "if it was decided to be justly due;" that the application was accordingly withdrawn, and the claim submitted to arbitration, and after the arbitrators had entered upon their duties, the defendant revoked their powers, whereby the claim against the estate was lost. The defendant pleaded non assumpsit, and several objections to a recovery were taken by him upon the trial; among them that his promise was within the statute of frauds, as being a promise to answer for a third person's debt, and a promise by an administrator to answer damages out of his own estate. But the plaintiff had a verdict, and the judgment thereon was reversed upon exceptions. In the opinion of the Supreme Court, the question arising under the statute

was discussed, as if the first and second clauses were equally applicable to the case ; and after holding that this promise was not within several classes of exceptions to the operation of the second clause, the court proceeded to consider the argument on the part of the plaintiff, that the discharge of the estate took it out of the statute. The decision of the question whether such a discharge would suffice, for the purpose, was not, it was said, necessary to the decision ; because there was no discharge of the estate at the time of giving the promise ; for an agreement to arbitrate is not a discharge of the cause of action, because the right to revoke is mutual. Nor was the case within the rule, that a new and original consideration moving between the parties would suffice, because the consideration did not move to the defendant, but only to the estate.

§ 39. The word "damages," as used in this clause of the statute, appears to be a superfluity, as the sense would be equally clear, and perhaps even clearer, had it been omitted. Nor is the phraseology much improved by the use of the phrase "debt or damages," which has been substituted for it in several of the enactments in the United States. In two of the latter, ^(h) the descriptive phrase of the sentence corresponding to this clause is, "promises by executors to pay the debt of their principals from their own estate," which, in addition to other limitations, confines the statutory requirement to debts of the deceased. But in general the American statutes have copied the language of the English act, or used words of like import ; and these are construed to include all liabilities resting upon the executor or administrator strictly in his representative character ; and which, but for the promise, he would have been liable to discharge only in due course of the administration of the estate ; but not those which were originally incurred by him, in consequence of some act of his own, even although it was an official act.

(h) The Iowa and Nebraska statutes ; and see the Oregon statute.

§ 40. An instance of the species of liability, which is not within the statute for this reason, although the point is not mentioned in the report, was presented to the Court of Common Pleas in *Meert v. Moessard*, 1 Moore and Payne, 8, A. D. 1827. There the defendant was one of the administrators (doubtless with the will annexed) of one Peter Defreene, who had left an annuity to his widow, secured by 2,000*l.* of government stock, which was to be divided among his children after her death. The widow having died abroad, the plaintiff, who had married one of the daughters, defrayed all the funeral expenses, to the payment of which all the children agreed to apply a half-year's dividend of 50*l.*, then due upon the stock. After the defendant and the other administrator had sold out the stock, for the purpose of dividing it, the defendant proposed to keep 40*l.* of the half-year's dividend for the purpose of paying the plaintiff, dividing the 10*l.* among the children, "to which all the other branches of the family assented;" and the money was retained accordingly, the defendant not being satisfied with the amount of the charges, which the plaintiff had stated at 61*l.* But it would appear, from the argument of counsel and what is said by the court, that the defendant made no express promise to the plaintiff at the time, and the action was for money had and received. The objection of the statute of frauds is not stated in the report to have been distinctly taken; but the plaintiff having obtained a verdict, the defendant applied for a rule nisi to set it aside, on the ground that there had been no communication between the parties; and no promise, express or implied, to render him liable for the funeral expenses of the widow, he having received the money as administrator of Peter Defreene.(†) The rule was refused, the court being of

(†) If it had been received as administrator of the widow, he would have been liable for the funeral expenses. From the fact that the case cited was *Rann v. Hughes*, ante, § 10, it is probable that the defendant relied upon the statute.

opinion that, as the money was left in the defendant's hands, with the assent of all parties, for the purpose of paying the plaintiff, the action could be maintained.

§ 41. The point was very clearly taken in a recent American case, *Chambers v. Robbins*, 28 Connecticut, 544, A. D. 1859. There the allegations of the declaration, as far as they are material to this subject, were, in substance, that the probate court had rendered a judgment admitting to probate the will of one Mary Robbins, deceased, and appointing the defendant her administrator with the will annexed; that the plaintiff and others, who were heirs at law, appealed from such decision of the probate court; that, while the appeal was pending, it was agreed between the plaintiff and the defendant, that it should be settled and discontinued, and that the defendant would pay the costs in the cause; but that he had not paid the costs, etc. At the trial in the court below, the plaintiff introduced evidence tending to prove a verbal promise to the effect stated in the declaration; and the defendant having objected to the evidence, the damages were assessed conditionally, subject to the opinion of the court; and this and another question were reserved for the advice of the Supreme Court. After argument, the court below was advised to render judgment for the plaintiff. Upon the question whether the promise was within the statute, Hinman, J., delivering the opinion, after saying that the defendant's promise was not within the statute, unless it was to answer damages out of his own estate, added: "But the promise was made in the defendant's private capacity, and was itself the foundation of his liability in this action; and so far as the costs in the action that had been pending constituted the basis of his liability, they accrued against him personally, and not against the estate. Whether he would have a right to charge them to the estate, when paid, is unimportant. Most of the personal obligations of an executor, contracted in the course of his administration, are proper charges against the estate in the final settlement of his account; but they are none the

less his private debts, for which he is alone liable in his private capacity. There is no more reason for saying that the promise set up in this case is within the statute, than there is for saying that the services of a laborer or of an attorney, which may be required in the course of the settlement of an estate, must be contracted for in writing; or the statute will preclude any recovery for them against the executor. We have no doubt, therefore, that the parol evidence was proper to prove the promise.”(j)

§ 42. With respect to an express promise by an executor to pay a general, that is, a pecuniary legacy, or by an administrator to pay a distributive share, the rule seems to be settled in England, that no action at law will lie against either, in his representative capacity, upon such a promise; but, if there was a distinct and adequate consideration to sustain a promise to pay out of his own means, and the promise was in writing, it is difficult to discover any good reason why the action will not lie to charge him *de bonis propriis*. It may be doubted whether the English cases, which are, at the best, quite obscure and unsatisfactory, go any further than to say, that where there is no new consideration, the action at law will not lie upon proof of assets merely. It was at one time held that a legatee might recover in an action against an executor, founded upon an express promise, made in consideration of assets;(k) but it was ruled otherwise in a subsequent case;(l) and, although there the executor had made no express promise, and the action was founded on his having sufficient assets, it is said by the leading elementary

(j) See as to the personal liability of a trustee for costs and other expenses incurred in the discharge of his trust, *Taylor v. Mygatt*, 26 Connecticut, 184; *McKay v. Royal*, 7 Jones (North Carolina), 426; per Welles, J., *Noyes v. Blakeman*, 6 New York (2 Selden), 580; *Bowman v. Tallman*, 2 Robertson (New York), 385.

(k) *Atkins v. Hill*, 1 Cowper, 284, A. D. 1775; *Hawkes v. Saunders*, id. 289, A. D. 1782.

(l) *Deeks v. Strutt*, 5 Term Reports, 690, A. D. 1794.

writers on that subject, that it is generally understood in England that this decision holds unqualifiedly that no such action will lie, either for a legacy or a distributive share. (m) But the rule is different with respect to a specific legacy, the title to which passes directly to the legatee upon the executor's assenting thereto. (n) However, the rule that the executor is not liable to an action at law, is restricted to cases where nothing has been done to separate the legacy from the common stock ; so that whenever, by arrangement with the legatees, he ceases to hold the money bequeathed in his character of executor, he may be sued as in other cases. (o)

§ 43. In several of the United States a legatee may maintain an action at law against an executor to recover a general legacy. This has been settled by a series of decisions in Massachusetts, where, although the courts concede that the common law rule is otherwise, the action is maintained by virtue of certain statutory provisions, commencing with a provincial statute of the 5th of William and Mary, and continued by subsequent enactments to the present time ; the effect of which seems to be that after the expiration of a specified time, if the executor has assets applicable to the payment of the legacy, an action may be maintained to recover the amount of the legacy de

(m) 2 Williams on Executors, sixth edition (A. D. 1867), page 1785, citing per Littledale, J., in *Jones v. Tanner*, 7 Barnewall and Cresswell, 542 ; and referring also to *Johnson v. Johnson*, 3 Bosanquet and Puller, 169 ; *Farish v. Wilson*, Peake's Nisi Prius, 73 ; *Nicholson v. Sherman*, T. Raymond, 23, and *Siderfin*, 45 ; per V. Ch. Knight Bruce, *Holland v. Clark*, 1 Younge and Collyer, Chancery, 167. And see *Roper on Legacies*, fourth edition, 1797, 1798.

(n) 2 Williams on Executors, sixth edition, p. 1278 ; citing *Williams v. Lee*, 3 Atkyns, 223 ; *Dix v. Burford*, 19 Beavan, 409 ; *Westwick v. Wyer*, 4 Coke, 28, b ; *Doe v. Guy*, 3 East, 120 ; *Barton's Case*, 1 Freeman, 289 ; *Bestard v. Stukely*, 2 Levinz, 209 ; *Paramour v. Yardley*, Plowden, 539 ; *Young v. Holmes*, 1 Strange, 70.

(o) *Gorton v. Dyson*, Gow, 78, A. D. 1819 ; *Hart v. Minors*, 2 Crompton and Meeson, 700 (1834) ; *Gregory v. Harman*, 1 Moore and Payne, 209 (1828).

bonis propriis, upon demand and refusal of payment. (*p*) In Connecticut, the existence of a similar right of action has been obscurely inferred, without any statutory provision, from two early cases; (*q*) but it is fully recognized by the more modern decisions, which rest the action upon an implied assumpsit, raised by the possession of assets, and the expiration of the time within which the legacy should have been paid, without any express promise; the objection which the English courts make to sustaining the action, namely, the impracticability of making suitable provisions for married women, etc., being regarded as obviated by the extensive jurisdiction of the probate courts; (*r*) and it has been accordingly said that an action will not lie in equity without the existence of special circumstances to confer equity jurisdiction, as in other cases where that jurisdiction is invoked. (*s*) In some of the other states it has been held that the action lies, without an express promise; either by virtue of some statutory provision, or because, as in Connecticut, the reasons assigned by the English courts are regarded as inoperative; (*t*) while in others, an express promise only will sustain it, made either in consideration of assets, or upon a new consideration. (*u*)

(*p*) *Farwell v. Jacobs*, 4 Massachusetts, 634, A. D. 1808; *Prescott v. Parker*, 14 Massachusetts, 429 (1817); *Miles v. Boyden*, 20 Massachusetts (3 Pickering), 213 (1825); *Hagood v. Houghton*, 39 Massachusetts (22 Pickering), 480 (1839); *Brooks v. Lynde*, 89 Massachusetts (7 Allen), 64 (1863).

(*q*) *Lamb v. Smith*, 1 Root, 419, A. D. 1792; *Spalding v. Spalding*, 2 Root, 271 (1795).

(*r*) *Goodwin v. Chaffee*, 4 Connecticut, 163, A. D. 1822; *Knapp v. Hanford*, 6 Connecticut, 170 (1826), and 7 Connecticut, 132 (1828); *Adams v. Spalding*, 12 Connecticut, 350 (1837).

(*s*) *Colt v. Colt*, 32 Connecticut, 422, A. D. 1865.

(*t*) *Pickering v. Pickering*, 6 New Hampshire, 120, A. D. 1833; *Payne v. Smith*, 12 New Hampshire, 34 (1841); *Cowell v. Oxford*, 1 Halstead (New Jersey), 432 (1798); *Bellerjeau v. Kotta*, 1 Southard (id.) 359 (1817); *Pettigrew v. Pettigrew*, 1 Stewart (Alabama), 580 (1828).

(*u*) *McNeil v. Quince*, 2 Haywood (North Carolina), 153, A. D. 1801; *Clark v. Herring*, 5 Binney (Pennsylvania), 33 (1812). Per Johnson, Chancellor, *Lark v. Linstead*, 2 Maryland Chancery Decisions, 163 (1850).

§ 44. But whatever may be, in general, the correct rule as to the right to maintain an action at law for a legacy or distributive share, it is clear that the statute applies to an express promise to pay it, when the action is founded upon such a promise, and its object is to charge the defendant personally. Such was assumed to be its construction in the English case, already referred to as having been subsequently overruled, of *Hawkes v. Saunders*, 1 Cowper, 289, A. D. 1782, where the question came before the King's Bench, upon a motion in arrest of judgment, the plaintiff having recovered a verdict. The declaration stated that the plaintiff was a legatee of George Saunders, and the defendant was his executrix; that assets more than sufficient to pay all debts and legacies came to her hands; and that in consideration thereof she promised to pay the plaintiff's legacy. It was held, after argument, that the plaintiff was entitled to judgment in this form of action, although it would necessarily be a judgment *de bonis propriis*, and the rule was discharged accordingly. Lord Mansfield, near the beginning of his opinion, said: "It is admitted at the bar that after verdict it must be taken to have been a promise in writing, and that there were assets."

§ 45. And it has been said in a Massachusetts decision, although apparently the statute of frauds does not provide for such a case, that a promise to pay a legacy or distributive share, when it was made in a representative capacity, and when the action is against the defendant in the same capacity, is not valid unless it was reduced to writing. Such appears to have been one of the points decided in *Hay v. Green, administrator*, 66 Massachusetts (12 Cushing), 282, A. D. 1853. There the defendant was sued as the administrator of the estate of Thomas Green, to recover the amount of the distributive share of Martin Green, a son of Thomas, in his father's estate, as decreed in the probate court. It appeared that Martin had become insolvent, and the plaintiff had purchased his share at a sale by his assignee, before it had been settled by the probate court; but he

claimed to recover upon a promise by the defendant, made after the settlement in the probate court, contained in an offer to pay to the plaintiff the sum at which the share had been settled, if he would deduct the amount of a note which the deceased had signed as Martin's surety, and which the defendant had paid before the plaintiff purchased the share ; but the plaintiff declined the offer, and brought this action to recover the whole of the distributive share. The plaintiff had a verdict, under the ruling of the judge that the action could be maintained ; and the verdict was set aside upon an exception to that ruling. The court held that Martin's distributive share passed to the assignee under the insolvent law ; but that although the assignee might maintain an action therefor, his vendee could not. Upon the point that the plaintiff could maintain the action by reason of the express promise, the court said that the doctrine would not help him ; first, because the promise was subject to the set-off ; and secondly, because "the promise, whatever its terms or conditions may have been, was oral only ; and the defendant, being administrator, and sued as such, is not liable on his promise unless it is in writing."

§ 46. But it is probable that the learned judge's remark with respect to the statute of frauds was inadvertent, for it is very evident that a promise which, in terms only, binds the executor or administrator to pay out of the assets of the estate, is not within the statute, whatever may be the other legal objections to maintaining an action upon it. Thus in *Greening v. Brown*, Minor (Alabama), 353, A. D. 1824, it was held that in an action against an executor in his official character, upon a note given by his testator, where the defendant pleaded the statute of limitations, a replication of a special promise by the executor was good upon special demurrer, although it was not averred to have been in writing, the court saying : "If the action had been on a promise by the executor to pay the debt out of his own estate, the statute of frauds would require that the promise should be in writing ; but, in order

to take the case out of the statute of limitations, it was not necessary that the promise of the executor should be in writing.”(v)

§ 47. Apparently a similar principle controlled the decision of the case of *Collins v. Row*, 10 Leigh (Virginia), 114, A. D. 1839. There an executor was sued in the County Court in his individual capacity, the declaration alleging a general promise to pay for goods sold and delivered to him for the use of the widow and legatees; and upon the trial the plaintiff proved the sale and delivery of the goods to the defendant for the use of the widow and legatees; and a verbal promise to pay for them *out of the testator's estate*, and that there were assets sufficient for the purpose. The defendant's counsel asked the judge to instruct the jury, that if the promise was to pay out of the testator's estate, and not out of his own estate, the promise was not binding unless it was in writing. The judge refused to give the instruction prayed for. The plaintiff had a verdict; and the judgment thereon was reversed in the Superior Court, with directions to give the instructions prayed for, if the plaintiff should give evidence that the goods were delivered to the family of the testator, or of the value or amount of assets which came to the defendant's hands. The plaintiff then brought error to the Court of Appeals, where the judgment of the Superior Court was reversed and that of the County Court affirmed.

§ 48. The report of this case omits the arguments of counsel, and the grounds upon which the decision in either court proceeded, and it is consequently somewhat obscure; but, if we understand it rightly, the defendant assumed no individual liability, notwithstanding the use of words in the statement of the allegations made in the declaration, and of the facts proved at the trial, which would imply that he became primarily responsible for the price of the goods. No doubt the transaction was meant to

(v) And see *Martin v. Black*, 20 Alabama, 309, A. D. 1852.

be a sale to the widow or legatees, and an agreement by the defendant, at their request, to pay the price out of funds applicable to the payment of their legacies ; and the struggle on the defendant's part appears to have been to bring the case within the second clause of this section. But if, according to the legal effect of the transaction, the sale was made exclusively upon the defendant's promise to pay out of the estate, there was no primary liability of any person to which the promise could be collateral ; and if the defendant himself assumed a primary liability in his individual capacity, his collateral promise in the capacity of executor was without the second clause, because it was to answer for the debt, not of *another person*, but of the *promisor in another capacity*. The case, therefore, seems then to have turned entirely upon the question whether the promise was within this clause of the statute ; and, from the language of the request for instructions, it is to be inferred that the particular point discussed was, whether a promise in terms to pay out of the estate was within the statutory prohibition. The proof of sufficient assets may have been introduced with a view of bringing the case within the principle of *Stebbins v. Smith*, and *Pratt v. Humphrey* ;^(w) but it was necessary, without reference to any question under the statute, for the purpose of showing that the condition had happened, upon which the defendant's promise depended, whereby he became personally liable for its breach.

(w) Ante §§ 26 and 28.

PART SECOND.

**OF SPECIAL PROMISES TO ANSWER FOR THE
DEBT, DEFAULT OR MISCARRIAGES OF
ANOTHER PERSON.**

CHAPTER SECOND.

OBSERVATIONS INTRODUCTORY TO THE CONSIDERATION OF THE SECOND CLAUSE OF THE FOURTH SECTION OF THE STATUTE.

ARTICLE I.

Explanation of the terms used in treating this subject.

§ 49. The second clause of the fourth section of the statute of frauds has given rise to more perplexing questions and contradictory decisions, than any other clause of that part of the statute which forms the subject of this treatise. It describes the species of contract embraced within its provisions as "ANY SPECIAL PROMISE TO ANSWER FOR THE DEBT, DEFAULT, OR MISCARRIAGES OF ANOTHER PERSON ;" and the same expression, with slight verbal alterations, has been copied into the various acts upon the same subject, in force in the United States. It is sometimes said that the contract to which this clause of the statute applies is a guaranty, and that word has been defined in the language of the statute.(a) But properly speaking, a guaranty is a contract to respond, only in case of the default of a person primarily liable for the payment of the same debt, or the performance of the same duty ;(b) whereas the

(a) Chitty on Contracts, 8th English edition, p. 469. In some standard treatises and digests this part of the statute is treated under the head of Guaranty.

(b) "A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is in the first instance liable to such payment or performance." Fell on Guaranty and Suretyship, page 1. "Guaranty is held to be the contract by which one person is bound to another, for the due fulfilment of a promise

statute includes also contracts to respond in the first instance, that is without reference to a default on the part of the other person. Guaranty, in a derivative or primary sense, is identical with warranty; this being an instance, of which there are some others, of the interchange of the Celtic prefix W, with the French prefix G, in the formation of our language; both prefixes being sometimes retained to form distinct words, having slight shades of difference in meaning.(c)

§ 50. As the exact meaning of the statutory definition is imperfectly conveyed by the word "guaranty," the term "collateral promise" is more commonly used, in the discussions to which this clause of the statute has given rise, to designate the species of contract to which it applies; and this term has also the advantage of admitting an antithetical expression, to designate an undertaking not within the provisions of the statute. Such an undertaking is commonly styled an original promise.(d) The use of these

or engagement of a third party." 2 Parsons on Contracts, 5th edition, p. 3. "A guaranty is an engagement to be responsible for the debts or duty of a third person, in the event of his failure to fulfil his engagement." 2 Story on Contracts, 4th edition, § 852. "Guaranty.—A promise made upon a good consideration, to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is, in the first instance, liable to such payment or performance." Bouvier's Law Dictionary, 8th edition, vol. I, p. 570.

(c) Thus guard and guardian are retained together with ward and warden; guerre is changed to war; and among proper names William and Walter are substituted for Guillaume and Gautier (anciently Gaultier). The word guaranty is commonly written *garantie* in the modern English books, and sometimes *guarantee*; though the latter orthography is objectionable, as it properly designates the correlative of guarantor.

(d) We cannot fix the precise date when the terms "original promise" and "collateral promise" acquired the meaning now generally ascribed to them. We find the word "collateral" erroneously used as late as 1730, in *Elkins v. Heart, Fitzgibbon*, 202, where counsel contended that a promise that a debtor should not go beyond the kingdom, without paying the plaintiff, was not within the statute of frauds, because it was "a collateral promise." But in *Stevens v. Squire, Comberbach*, 362, A. D. 1696, Holt, C. J., used the

expressions is not restricted to cases arising under the statute of frauds; on the contrary they are habitually employed to designate the contracts of principal and surety respectively, in all appropriate cases. But they are so peculiarly associated in the law with the statute of frauds, that they may almost be said to have been incorporated into the statute by universal consent. And, as it is rare to find any two expressions which are exactly synonymous, it has happened sometimes that the constant use of the term "collateral promise," to designate the species of contract, indicated by the rather cumbrous phraseology of the statute, and of the term "original promise" to designate one of the opposite species, has given rise to confusion and even to error. Thus Comstock, C. J., in the course of his opinion in *Mallory v. Gillett*, 21 New York, 412, which will be hereafter frequently referred to, says: "There is sometimes danger of error creeping into the law through a mere misunderstanding or misuse of terms. The words 'original' and 'collateral' are not in the statute of frauds; but they were used at an early day; the one to mark the obligation of a principal debtor; the other that of the person who undertook to answer for such debt. This was, no doubt, an accurate use of language; but it has sometimes happened that, by losing sight of the exact ideas represented in these terms, the word 'original' has been used to characterize any new promise to pay an antecedent debt of another person. Such promises have been called original, because they are new; and then, as original undertakings are agreed not to be within the statute of frauds, so these new promises, it is often argued,

word "original" in its modern sense, and in *Birkmyr v. Darnell*, 1 Salkeld, 27; 6 Modern, 248; and 2 Lord Raymond, 1085, A. D. 1704, he employed the word "collateral" to designate its antithesis. The distinction between the two forms of expression, with direct reference to the application of the statute of frauds, was taken by Lee, C. J., in *Read v. Nash*, 1 Wilson, 305, A. D. 1751; and we believe that *Elkins v. Heart* is the latest case where the term "collateral promise" was used as descriptive of a promise not within the statute; although in some American cases we have met with the expression "an original collateral promise."

are not within it. If the terms of the statute were adhered to, or a more discriminating use were made of words not contained in it, there would be no danger of falling into errors of this description.”(e)

§ 51. For the purpose of avoiding circuitry or redundancy of expression, we shall, in the discussion under this clause, always use certain words in a particular and somewhat conventional sense; except where a different meaning is indicated in the passage where they appear. Thus the term “promisor” will be employed specifically to designate the person whose liability, under a verbal promise, which is supposed to be to answer for the debt, default, or miscarriage of another, is the subject of discussion. Of course the person to whom the promise was made will be generally styled the “promisee;” but occasionally the word “creditor” will be used to designate him; and the words “debt” or “indebtedness” to designate the liability which the promisor has assumed to discharge, without reference to the question whether such liability arises out of a contract to pay money, or to perform some other act; or whether it arises out of a tort. And when we speak of “the third person,” we always mean him for whose debt, default or miscarriage, the promisor has undertaken, or is supposed to have undertaken, to answer; except of course when the language of others is quoted, wherein that term is used, as frequently happens, to denote the person whom we style the promisor. The peculiar appropriateness and precision of the expression “the *third* person,” in the sense in which we use it, will appear hereafter.

(e) See also Buller's *Nisi Prius*, page 281; and per Grover, J., in *Brown v. Weber*, 38 New York, 187, on page 190.

ARTICLE II.

How far the consideration of a verbal promise affects its validity.

§ 52. A few general suggestions upon this subject will be useful here ; although, as the question enters into nearly every discussion arising under this branch of the statute, they will necessarily be merely prefatory to a more complete examination hereafter. A vast amount of error has been predicated upon, and defended by arguments, growing out of the nature and character of the consideration of the promise. A struggle was commenced, almost simultaneously with the enactment of the statute, to withdraw from its operation, undertakings which were clearly nothing but promises to answer for the debt, default, or miscarriages of another person, but which were founded upon meritorious considerations of different kinds ; and it has been maintained ever since, with great persistence and ingenuity, and at times with considerable success. In England, the rule is now generally admitted to be that the character of the consideration is immaterial ;(a) and we believe that the courts in this country are tending to the same conclusion ; but the contrary opinion has had great prevalence among us, and its extinction has been a work of time and difficulty. At one period of our legal history, the doctrine that any new and original consideration, whether of benefit to the promisor or harm to the promisee, sufficed to sustain a verbal promise to pay the debt of another, was generally recognized as a settled

(a) The correct rule, as recognized in England, is contained in the following extract from Messrs. Patteson and Williams's note to *Forth v. Stanton*, 1 Williams's Saunders, 211 : "The question, indeed, is, what is the promise? whether it be a promise to answer for the debt, default, or miscarriage of another, for which that other remains liable ; not what the consideration for the promise is ; for it is plain that the nature of the consideration cannot affect the terms of the promise itself, unless, as in the case of *Goodman v. Chase*, it be an extinguishment of the liability of the original party." See *Fitzgerald v. Dressler*, 7 Common Bench, N. S., 374, cited in full hereafter.

principle of American jurisprudence,(b) and even to the present day, a rule not essentially different may be found laid down in some cases of very high authority.(c)

§ 53. But it is believed that the proposition can now be maintained upon principle and upon the weight of authority, that, although the nature and effect of the consideration are frequently material elements in determining the question, whether a particular case is within the statute, they are so only as far as they shed light upon the character of the promise; that is, whether it is an undertaking to answer for another's debt or default, in the sense contemplated by the statute, as the latter is construed by the rules generally recognized for that purpose. For instance, if the foundation of the promisor's engagement to pay money appears to have been the delivery of goods, by the promisee, to the third person; *prima facie* it is a sale to the latter, and he is liable for the price; and, therefore, the express undertaking of the promisor to respond for the price, is collateral to the implied undertaking of the purchaser to the same effect. But if it be alleged that in fact there was no sale to the person to whom the goods were delivered, the delivery having been upon the credit of the defendant's promise only, although the nature and character of the consideration then become the turning points of the case, their

(b) In *Meech v. Smith*, 7 Wendell (New York), 315, A. D. 1831, Savage, Ch. J., said: "Was the contract within the statute of frauds? It is a parol agreement to pay the debt of a third person, and is therefore within the terms of the statute. The rule, however, has long been settled, that though such a promise be by parol, if it arises out of some new and original consideration of benefit or harm, moving between the newly contracting parties, it is not a case within the statute; it then becomes a new and original contract. Such a promise is void in such cases only, when the debt of the third person is the only consideration, or when the new consideration is not sufficient to support the contract." "This rule has been recognized by all writers on contracts, and has been recognized by the highest court in this state; it is, therefore, as much the law of the land as the statute itself."

(c) This question is fully discussed in the seventeenth chapter.

importance is not due to any efficacy attaching directly to the consideration itself, but to the light which they shed upon the character of the promise. For if the third person was not liable, the promise must have been original in its character; because there was no debt of another to which it could have been collateral. So when a promise to pay a debt due from a third person is taken out of the statute, because it is to be fulfilled out of a fund placed by him in the hands of the promisor, the existence of such a fund, as a part of the consideration, is material only because it shows that the promisor was already in some form liable to pay the debt, or that the promise was not to be fulfilled out of his own means, or that for some other reason his engagement was in reality of a different character from a promise to pay out of his own means, as in form it purported to be. So, also, if the consideration was the release or surrender of some lien upon property, available to the promisee for the collection of his debt; the rule, as now understood, is that the promise is without the statute, only when the promisor was the owner of some title to or interest in the property, so that he acquired whatever was surrendered by the promisee; the nature of the consideration, therefore, becomes material, as showing that the promise was in reality an undertaking to pay a charge already resting upon the promisor's property; and hence that he undertook merely for the payment of that which, in a qualified sense, was already his own debt. (d)

(d) As will be seen hereafter (chapter xvii), we deny the soundness of the general proposition, which some of the most respectable American authorities yet maintain, that a promise is without the statute, when the leading object of the promisor was to subserve some interest of his own; and the discharge of the third person was only to be incidentally accomplished by the fulfilment of the promise. Where the consideration of the promise was the simultaneous discharge of the third person from an antecedent debt, the promise is without the statute, for the same reason which obtains when the consideration of the promise was goods, etc., then delivered to the third person upon the credit of the promise only; namely, because there was no debt to which the promisor's undertaking could be collateral. These two classes of cases illustrate the proposition stated in the text quite as forcibly

§ 54. In these cases, the nature, character and effect of the consideration are merely circumstances which show what was the substantial, as distinguished, (if necessary,) from the formal character of the promise. But if the circumstances fail to show that the promise was not to answer for the debt, default or miscarriage of another, within some of the settled rules of construction, whereby undertakings, although in form of that character, are regarded as promises to answer for the debt, default or miscarriage of the promisor; no consideration, however meritorious, or whatsoever may be its nature, character or effect, will suffice to enable the promisee to recover, unless he can produce, as evidence of the promise, a writing satisfying all the requirements of the statute. This remark will be further illustrated by a reference to the general rules for testing the application of the statute, contained in the fourth article of this chapter; in which, whenever any mention is made of the consideration, it is referred to rather as descriptive of the transaction, than as a material element affecting the question whether the case is within the statute.

§ 55. Therefore no amount of hardship to the promisee, not even the fact that he has lost all remedy upon a meritorious cause of action, in consequence of his reliance upon the promise, will save it from the operation of the statute. In *Trustees of Free Schools, etc., v. Flint*, 54 Massachusetts (13 Metcalf), 539, A. D. 1847, the plaintiffs proved at the trial that the defendant was a member of a corporation which was indebted to the plaintiffs, and had become insolvent; that the members had adopted a by-law

as the others; but the latter is not specially referred to with the rest, because the fact that the discharge was the consideration of the promise is believed to be immaterial. For the rule is equally applicable, when the consideration of the promise was something else; provided that the debt was in fact discharged when the promise was made, or was to be discharged under such circumstances that an agreement to discharge it will suffice to satisfy the rule; a question discussed in a subsequent chapter

pledging themselves to be individually liable for the debts of the corporation ; that the defendant himself had represented to other creditors that the members were personally liable for the debts, and had handed them printed copies of the by-laws, upon which assurance they had advanced money to the corporation ; and that the defendant as treasurer of the corporation, executed the note upon which the plaintiffs' demand was founded, in consideration of money advanced to it by the plaintiffs, through the defendant, as their treasurer ; but it was held, upon a case reserved, that he was not liable under the statute.

§ 56. And in *Rogers v. Rogers*, 6 Jones (North Carolina), 300, A. D. 1859, the defendant's son had been imprisoned at Wilmington upon a charge of forgery ; and the plaintiff, at the son's request, went from his home, at a distance, to Wilmington ; procured a person at Raleigh, named Buffalow to consent to unite with him in becoming bail for the son, provided the defendant would indemnify him ; and went to the defendant's house, at a distance in another direction, to procure him to execute the bond of indemnity. While there, the plaintiff expressed a fear that he would lose a debt which the son owed him ; whereupon the defendant replied "that if the plaintiff would go to Wilmington with Buffalow and become the bail of his son, he should lose nothing by what he had done or might do for him ;" and afterwards, on the plaintiff requesting him to put this promise in writing, he answered that his word was as good as his bond, and called upon a witness present to take notice ; and then repeated the promise, with the addition that all the debts which the son owed the plaintiff should be paid. The plaintiff went to Wilmington with Buffalow, and they became bail accordingly for the son ; and the son being detained by writs in civil cases, which had been issued in the mean time, the defendant sent an agent, who, acting under a power of attorney from the plaintiff, compromised the debts upon which he was arrested, so that the son was discharged ; whereupon he left the State and did not return. In an action upon the

promise, it was held that so much of the promise as related to the debt then due by the son was within the statute, and there having been a payment of forty or fifty dollars made by the defendant, on account of the expenses of the journey, which, for aught the court could see from the evidence, was sufficient for that purpose, no notice to the contrary ever having been given to the defendant; it was held that the judge at the trial correctly charged the jury that the defendant was not liable; and a judgment for the defendant was accordingly affirmed on appeal.

§ 57. So in *Hill v. Doughty*, 11 Iredell (North Carolina), 195, A. D. 1850, the two defendants and their sister were equitably liable to refund to the plaintiff, a creditor of their father, so much of the distributive shares of their father's estate received by them, as might be required to pay the plaintiff's demand; and in consideration of forbearance on the part of the plaintiff, to take proceedings to compel the defendants so to refund, they verbally promised to pay the debt; and it was held that the promise of each was void as to all but his one-third of the debt, and a joint promise by both was void in toto.(e)

§ 58. Of the numerous cases where the promise was held to be within the statute, when founded upon a consideration moving to the third person, it will be sufficient to cite only a few. Thus, where the consideration was an extension of the time for payment of the debt, by the third person, or forbearance to sue him, either generally, or for a limited time,(f) or forbearing to distrain for rent upon

(e) Compare this case with *Templetons v. Bascom*, 38 Vermont, 132. Both are fully cited hereafter.

(f) *Caston v. Moss*, 1 Bailey (South Carolina), 14; *Kirkham v. Marter*, 2 Barnewall and Alderson, 613; *Rothery v. Curry*, Buller's Nisi Prius, 281; *Bennett v. Pratt*, 4 Denio (New York), 275; *Simpson v. Patten*, 4 Johnson (New York), 422; *Jackson v. Rayner*, 12 Johnson (New York), 291; *Button v. Thrailkill*, 5 Jones (North Carolina), 329; *Dexter v. Blanchard*, 93 Massachusetts (11 Allen), 365; *Musick v. Musick*, 7 Missouri, 495; *Scott v. Thomas*, 1 Scammon (Illinois), 58; *King v. Wilson*, 2 Strange, 873; *Smith v. Ives*, 15 Wendell (New York), 182; *Packer v. Willson*, 15 Wendell (New York), 343.

his property (the defendant having no personal interest therein), (g) or forbearing to issue an attachment against him, (h) even although in consequence of such forbearance, upon the faith of the promise, the debt was ultimately lost to the promisee; (i) or discontinuing or staying a suit already commenced against him, (j) or forbearing to issue an execution upon judgment recovered against him, (k) or releasing the levy of an execution or attachment against his property, (l) or surrendering to him a pledge, or a lien upon his property; (m) in each of these cases, the consideration, however meritorious, has been held to be insufficient to enable the promisee to maintain an action upon

(g) *Thomas v. Williams*, 10 Barnewall and Cresswell, 664.

(h) *Jones v. Walker*, 13 B. Monroe (Kentucky), 356; *Watson v. Randall*, 20 Wendell (New York), 201.

(i) *Westheimer v. Peacock*, 2 Iowa, 528; *Rogers v. Rogers*, 6 Jones (North Carolina), 300; but see *Lampson v. Hobart*, 28 Vermont, 697, and *Templetons v. Bascom*, 33 Vermont, 132, commented upon in chapter xvii.

(j) *Tomlinson v. Gell*, 6 Adolphus and Ellis, 564; *Saunders v. Wakefield*, 4 Barnewall and Alderson, 595; *Cole v. Dyer*, 1 Crompton and Jervis, 461; *Rowe v. Whittier*, 21 Maine, 545; *Nelson v. Boynton*, 44 Massachusetts (3 Metcalf), 396; *Chater v. Beckett*, 7 Term Reports, 201; *Fish v. Hutchinson*, 2 Wilson, 94.

(k) *Russell v. Babcock*, 14 Maine, 138, as explained in *Hilton v. Dinsmore*, 21 Maine, 410; *Durham v. Arledge*, 1 Strobhart (South Carolina), 5; *Allhouse v. Ramsay*, 6 Wharton (Pennsylvania), 331; *Caperton v. Gray*, 4 Yerger (Tennessee), 568.

(l) *Boyce v. Owens*, 2 McCord (South Carolina), 208; *Nelson v. Boynton*, 44 Massachusetts (3 Metcalf), 396; *Lieber v. Levy*, 3 Metcalfe (Kentucky), 292; *Stern v. Drinker*, 2 E. D. Smith (New York), 401. But there is a question whether the release of a sufficient levy, under an execution, would not have the effect to discharge the debt and to take the promise out of the statute for that reason; which is discussed in a subsequent chapter. And it has been said in one case that such was the effect of the release of a levy under a domestic attachment, *Tindal v. Touchberry*, 3 Strobhart (South Carolina), 177; but doubtless this remark is based upon some peculiarity of the local law.

(m) Per Gray, J., *Furbish v. Goodnow*, 98 Massachusetts, 296; *Corkins v. Collins*, 16 Michigan, 478; *Olancy v. Piggott*, 4 Nevile and Manning, 496; *Mallory v. Gillett*, 21 New York, 412.

the promisor's verbal undertaking to pay the debt, either generally or within a limited time.

§ 59. Nor will it suffice to take out of the statute a promise to answer for the debt of another, that the promisor himself received the benefit of the consideration, even if it enured to his benefit exclusively. Thus in *Fowler v. Moller*, 4 Bosworth, 149, the New York Superior Court held that a promise made by the assignee of a lease, to the landlord, in consideration that the latter would allow him to remain upon the premises, until he could dispose of a stock of goods also assigned to him by the lessor; to the effect that he would pay the arrears of rent due from his assignor, was within the statute, and void because not in writing. So in *Emmet v. Dewhurst*, 3 MacNaghten and Gordon, 587, the consideration of the promise was an act which had a direct tendency to reduce the amount of money for which the promisor had become liable. So, in *Blake v. Parlin*, 22 Maine, 395, the defendant lived with her son, who had verbally hired a house from the plaintiff; and while they were moving in, the plaintiff called at the house, and refused to allow them to go in, unless the defendant would agree to see that the rent was paid, to which she verbally assented, and her promise was held to be within the statute. But it is unnecessary to multiply these citations, as similar cases will be found scattered in great profusion throughout the succeeding pages under nearly every rule hereafter to be discussed.

§ 60. On the other hand, where the promise is of such a character, and made under such circumstances, that it is deemed an original promise, the fact that the promisor derived no benefit whatever from the consideration, and that it enured, with the knowledge of the promisee, exclusively to the benefit of the third person, will not bring the case within the statute. The circumstance is only material in its bearing upon the question whether the promise was in fact original or collateral. The principles regulating this class of promises form the subject of discussion in

those chapters of this work, devoted to the consideration of the third and fourth general rules, which are so crowded with cases illustrating the doctrine just adverted to, that it would be useless to attempt to collect them again in this place. (n)

ARTICLE III.

General classification of cases, apparently or actually within the terms of this clause of the statute, where verbal promises are nevertheless valid

§ 61. There have been very few attempts to classify the cases arising under the second clause of the fourth section of the statute of frauds, so as to arrange those which are akin to each other, under the distinctive principles or rules upon which they respectively depend. This has been partly the cause, and partly the effect of the confusion which now prevails in this branch of the law; and it is much to be regretted that the task was not attempted at an earlier day, when the cases were fewer and less discordant than they now are. It might then have been practicable for a judge or a commentator, possessing the requisite ability and reputation, to lay down a series of principles regulating the application of the statute, which would have commanded general recognition, as a standard by which cases would be tested; and under which they would have been ranged by the courts in their proper places, as they should subsequently present themselves for examination and decision; thereby avoiding much of the incoherence of argument and conflict of authority which has now become incurable. For want of such a standard, many causes have been decided without due consideration, upon grounds which, although apparently satisfactory in the particular case, would not bear expan-

(n) In the following cases the principle, which is involved, without being always specially mentioned, in the numerous others cited in the chapters referred to, is expressly laid down: *Faires v. Lodanc*, 10 Alabama, 60; *Backus v. Clark*, 1 Kansas, 303; *Proprietors Upper Locks v. Abbott*, 14 New Hampshire, 157; *Brown v. George*, 17 New Hampshire, 128.

sion into a general principle. Every such case has, of course, added to the existing confusion. Hence it has resulted that nearly all the rules appertaining to this subject, which may be called settled, have been very slowly developed; and most of them have been adopted, only after great fluctuation of opinion, amounting frequently to a complete reversal of the course of decision which prevailed for a long time; many principles upon which the solution of the most important questions depends, are to this day obscure and uncertain in their terms and in their application; and, with respect to other questions of vital importance, and of constant practical occurrence, the cases are still so discordant and conflicting that no principle is definitely settled. To some extent this is true in every department of legal science; but in none other are these inconveniences and disorders so numerous or so glaring, as in that of which we are now treating. The evil has now become so great that it is in a great measure remediless; for it is no longer possible that this branch of the law should be thoroughly and systematically digested.

§ 62. Mr. Roberts's work, which is the only treatise exclusively devoted to the statute ever published in England, although in many respects valuable, really contains only one correct and well defined principle regulating the application of the statute to collateral undertakings; namely, that where the promise does not relate to a precedent liability of the third person, the question whether it is original or collateral, depends upon whether the third person incurred any liability, concurrently with the promisor; (a) and to this day the recognized standard in England is the collection of notes, written at different times, appended to the case of *Forth v. Stanton*, on page 211 of the first volume of Saunders's Reports, an annotated edition of which was first prepared by Mr. Serjeant Williams,

(a) "In discussing this critical part of the statute, though much has of necessity been left to float on the facts and circumstances of the particular cases, one anchorage has at least been gained, viz.: that the person undertaken for must be or become liable at the time the promise by the third person is made." Roberts on Frauds, page 224.

and has since been continued from time to time by Mr. Justice Patteson and Mr. Justice Williams. The case itself is so far from being an authority under the statute of frauds, that it was decided before the statute was enacted; and the notes, though written by very distinguished jurists, and well deserving the high estimation in which they are held, make no pretence of classifying the cases, or even of an orderly and systematic arrangement of the authorities cited, or the subjects considered.

§ 63. In the United States, Mr. Chief Justice (afterwards Chancellor) Kent rendered the profession a signal service, by a classification of the cases made in the course of his opinion, delivered in *Leonard v. Vredenburg*, 8 Johnson (New York), 23, A. D. 1811. The favor with which it was received, notwithstanding its incompleteness, proved how urgent was the need which it supplied. For a long series of years, the test of the application of the statute, throughout the United States, was to ascertain in which of Chancellor Kent's three classes the particular case belonged. The following extract contains the entire classification referred to: "There are, then, three distinct classes of cases on this subject, which require to be discriminated; 1. Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here, as we have already seen, is not, nor need be, any other consideration, than that moving between the creditor and original debtor. 2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here there must be some further consideration shown, having an immediate respect to such liability, for the consideration for the original debt will not attach to this subsequent promise. 3. A third class of cases, and to which I have already alluded, is when the promise to pay the debt of another arises out of some new and original con-

sideration of benefit or harm, moving between the newly contracting parties. The two first classes of cases are within the statute of frauds, but the last is not."

§ 64. This classification, however, falls short of including a large number of cases, and the principle which is stated as governing the third class has led to considerable error, and has not stood the test of time, at least not in the language of the learned Chief Justice. A much more complete classification is to be found at the conclusion of the opinion of Comstock, C. J., delivered in the year 1860, in *Mallory v. Gillett*, 21 New York, 412, on pages 432 and 433, as follows: "Without pursuing this discussion further, the general rule is, that all promises to answer for the debt or default of a third person must be in writing, whether the promise be made before, at the time, or after the debt or liability is created. Such is the rule, because so is the statute of frauds. The statute makes no exception of any promise which is of that character. The courts have made no exceptions; as clearly they should not. But a considerable variety of undertakings, having points of resemblance and analogy to such promises, have been held not to be within the statute. These may be chiefly, if not wholly, arranged in the following classes: 1. Where there was no original debt to which the auxiliary promise could be collateral; for example, where the promisee was a mere guarantor for the third person to some one else, and the promisor agrees to indemnify him; or where his demand was founded in a pure tort. 2. Where the original debt becomes extinguished, and the creditor has only the new promise to rely upon; for example, where such new undertaking is accepted as a substitute for the original demand; or where the original demand is deemed satisfied by the arrest of the debtor's body or a levy on his goods, the arrest or levy being discharged by the creditor's consent. 3. Where, although the debt remains, the promise is founded on a new consideration which moves to the promisor. This consideration may come from the debtor, as where he puts a fund in the hands of the prom-

isee" (promisor), "either by absolute transfer, or upon a trust to pay the debt; or it may be in his hands, charged with the debt as a prior lien, as in the case of *Williams v. Leper*, and many others. So the consideration may originate in a new and independent dealing between the promisor and the creditor, the undertaking to answer for the debt of another being one of the incidents of that dealing. Thus A, for any compensation agreed on between him and B, may undertake that C shall pay his debt to B. So A, himself being the creditor of C, may transfer the obligation to B upon any sufficient consideration, and guaranty it by parol. If we go beyond these exceptional and peculiar cases, and withdraw from the statute all promises of this nature, where the debtor alone is benefited by the consideration of the new undertaking, and the debt still subsists; then we leave absolutely nothing for the statute to operate upon."

§ 65. This classification, unlike Chancellor Kent's, which includes cases within as well as without the statute, is confined entirely to the latter; but it is, of course, sufficient to classify either kind of cases alone, provided the work is done so exactly and comprehensively, as to leave all those not embraced in the classification, to fall within the other kind. With respect to the classification in question, it is believed to be so far complete, that there is a place within it for every case where a verbal promise is sufficient to lay the foundation of an action; but it is open to the objection, inseparable, perhaps, from the condensation necessary in a judicial opinion, that the language is so general, as not only to prevent it from being of much practical use, but also to leave room for some cases to creep in where the true construction of the statute requires the promise to be in writing. Indeed, a closer examination of the terms of this classification will reveal the fact, that its completeness is owing to the great elasticity of the definition of the first class, which is very far from being equivalent to Mr. Roberts's proposition, or to the third of the general rules, under which the cases are arranged in

this volume ; but on the contrary is scarcely more definite, either with respect to the language used, or the meaning of its learned author, than if he had repeated the words of the statute itself. (b)

(b) It is a striking illustration of the extreme difficulty of classifying the cases, that, while the body of this long and important opinion has received the highest encomiums in subsequent cases, the illustrations, whereby the learned Chief Justice explains the terms upon which his classification depends, have already been dissented from in two cases cited fully hereafter. *Fullam v. Adama*, 37 Vermont, 391, expressly overrules one of the propositions of the third class ; and in *Baker v. Dillman*, 12 Abbott's Practice Reports, 313, and 21 Howard's Practice Reports, 444, the New York Supreme Court, refused to be bound by the proposition illustrating the first class, holding that it was obiter, and not sustained by the authorities. Another instance of an attempt at classification by a very able writer, based upon that of Chief Justice Kent, but which was afterwards abandoned by its author, is to be found in the first edition of the American notes to Smith's Leading Cases, vol. 1, page 329, as follows: "The most natural division of the cases which arise under the statute of frauds, is into those in which the engagement of the promise is given at or before the creation of the debt, and those in which it is given subsequently. The second class has again been subdivided into two others; those in which the promise is given upon a consideration growing out of the debt itself, and those in which the consideration is new and distinct in its nature." But in the sixth edition the author merely says that the cases have been so classified, and he adds: "But although this classification has been frequently cited with approbation, and may be used to group and methodize the decisions, we may doubt whether any valid distinction exists, so far as the operation of the statute is concerned, between those cases where the debt agreed to be paid is antecedent, and those where it is contemporaneous." An enumeration, rather than a classification, of cases not within the statute, is also to be found in the opinion of Bell, C. J., delivered in *Robinson v. Gilman*, 43 New Hampshire, 485, as follows: "In the following cases the promise has been held binding without writing: (1) Where the debtor has put into the hands of the promisor the amount of his debt; (2) or transferred to him property equivalent; (3) or something of equivalent advantage to himself, as a license to keep a public house; (4) or where the promisee has transferred or released to the promisor some interest in the property of the debtor; as a lien given by law to the seller for the price of goods sold, but not delivered; or to a landlord upon the goods of his tenant for rent; or of a bailee for services; or of an insurance agent on policies in his hands; (5) or where the promisee has released to the promisor and holder of the property an attachment; or a trustee process; (6) or where he has released to the promisor the right to attach property of the debtor; or to bring a suit in the admiralty to enforce a lien; or to bring a trustee suit against a party having funds of the debtor in his hands."

§ 66. As these attempts at classification have proved to be faulty, notwithstanding the acknowledged learning and ability of their framers, perhaps the difficulty may be in a measure traceable to the fact, that the basis of each of them consisted, at least in part, of incidental features of the cases, rather than the distinctive principles which take certain promises out of the statute. Chief Justice Kent's classes depend, first, upon the time when each promise was made with respect to the other, and secondly, upon the nature of the consideration or the persons between whom it moved. Whether the second promise was made simultaneously with, or subsequently to the making of the first, is entirely immaterial upon the question whether the statute is applicable; and the same is true of all questions appertaining to the consideration, as was stated in the last article, except so far as they may shed light upon the character of the promise. The classification of Chief Justice Comstock, on the other hand, whatever may be its imperfections of detail, commences very correctly with adopting, as the basis of its first two terms, principles upon which promises are taken out of the statute; but it fails in its third term, which depends upon something connected with the immaterial feature of the consideration.

§ 67. Possibly, therefore, a nearer approach to the desideratum may be reached, by means of a classification of cases without the statute, depending entirely upon the principles by which they are respectively regarded as being excluded from its provisions; using the incidental characteristics, such as the order of time in which the promise was made, with respect to the supposed original liability, and all questions connected with the consideration, with other convenient matters, as grounds for the formation of sub-classes, or as illustrations of the application of a general principle, or as the distinguishing features of limitations or exceptions to its operation. It would be idle, however, to expect a perfect and homogeneous system, as the result of the adoption of that or any other principle; for the materials with which the work must be

done, render such result impossible of attainment, whatever ability, patience and industry may be brought to the task.

§ 68. The fundamental principles, upon which cases, having a resemblance to those described within the clause of the statute now under consideration, or exactly answering that description, are excluded from the operation of the statutory prohibition of oral evidence to sustain the promise, may be said, in a general and comprehensive way, to be three in number. And thereupon we propose to base **THREE GENERAL DIVISIONS OF CASES NOT WITHIN THE STATUTE**, each with its appropriate subdivisions into classes, as follows :

§ 69. *First general division.* Cases which are not governed by this clause of the statute of frauds, although they fall within its terms. These consist of those cases where the construction and validity of the promise depend, I. Upon the law merchant ; or, II. Upon the provisions of some other statute. There is no room for construction of the statute in cases of this description, as they are entirely outside of it.

§ 70. *Second general division.* Cases which are not within this clause of the statute, because the terms of the statutory description of the promises to which it applies, are only partially satisfied. These are naturally distributed into classes, depending upon the particular term which is not satisfied, some of which admit of still further subdivision. They are, I. Cases where the promise is not "special;" II. Cases where the liability, which the action is brought to enforce, grows out of something else than a "promise;" III. Cases where the promise, although it relates to the liability of a third person, was not to "answer" therefor ; IV. Cases where there was no original liability for a "debt, default or miscarriage," to which the undertaking of the promisor could be collateral, either (1) because the third person had incurred no corres-

ponding liability, at the time when the promise took effect; or (2) because a previous corresponding liability, incurred by him, had been discharged before the promise took effect; V. Cases where there was nobody in the transaction to whom the term "another person" could apply; either (1) because the promise was to pay the debt, or answer for the default or miscarriage of the promisee, to a person not a party to the contract; or (2) because the promise was to answer for the payment of a debt or the fulfilment of a duty to some person, other than the promisee, by one who was not a party to the contract.(c)

§ 71. *Third general division.* Cases which are not within this clause of the statute, although all the terms of the statutory description of the promises to which it applies are literally satisfied, because they are not within its spirit and intent. Here we are met at almost every step by decisions, which clash so irreconcilably, that even

(c) Upon principle we would add two additional subdivisions to this class, namely: (3) because the promise was to answer for the debt, default or miscarriage of some person to be thereafter designated by the promisor; and (4) because the promise was to answer for the debt of a deceased person. The first of the subdivisions mentioned in the text, is the only one where the rule is settled by common consent, as depending upon the principle which characterizes the class; and there is considerable conflict of authority whether particular kinds of cases come within that subdivision, as we shall see in the discussion under the fifth general rule. The second subdivision consists of the cases where the promise was to indemnify the promisee, against a liability to be incurred by him, at the request of the promisor only, but as security for the fulfilment of a third person's engagement to a fourth (see chapter xiii, article ii), which, we think, are shown not to be within the statute, by the weight of principle and authority. Our proposed third subdivision of this class would embrace cases involving the liability of a factor, acting for the promisee under a *del credere* commission; and all other similar cases where the promisor is thereafter to select the persons for whose fidelity to their engagements he undertakes to be responsible. But with respect to factors' contracts, a sufficient reason may be assigned, as will appear in the proper place, for putting them in the third general division; and they will accordingly be found there, in accordance with what seems to be the inclination of the courts. The fourth subdivision would comprise the cases already referred to in § 16.

the principles upon which the different classes depend are open to doubt. But we regard the following statement of the classes within this division, as defensible upon the weight of reasoning and authority; viz.: I. Cases where the promisor was, or had been previously liable for the same or a similar debt or duty, although his liability may have been in another form, or to another person; II. Cases where the promise was to be fulfilled out of the means of the debtor; III. Cases where the debt assumed by the promise was already a charge upon the property of the promisor; IV. Cases where the promisor guarantied the payment by a third person of a debt transferred by the promisor to the promisee; V. Cases where the debt guarantied was thereafter to be contracted by the promisor, acting as a factor for the promisee, under a *del credere* commission. (d)

(d) The writer having framed this classification, without any suspicion that it was not entirely original; and adopted it as the framework of this part of his undertaking with great hesitation, lest it should be regarded as too fanciful; is gratified in finding most of its essential principles declared, in the opinion of a learned and able judge, delivered before this work was planned, but published as the present volume was approaching completion. In *Furbish v. Goodnow*, 98 Massachusetts, 296, decided A. D. 1867, Gray, J., said: "By the established construction of this clause 'a special promise,' in order to fall within the statute, must be express, and not merely implied by law; 'to answer for a debt,' for which the promisor's person or estate is not already liable; 'of another' than either of the parties to the promise; and who, if already liable for the debt, continues so liable. Even when all these elements concur, still if the principal and immediate object of the transaction is to benefit the promisor, not to secure the debt of another person, the promise is considered, not as collateral to the debt of another, but as creating an original debt from the promisor, which is not within the statute, although one effect of its payment may be to discharge the debt of another." (See the case abstracted in § 563, 564.) We are compelled, however, to dissent from the learned judge, with respect to the class of cases, which he apparently regards as the only one, where the promise is without the intent of the statute, although it is embraced by its terms. The diffidence which accompanies this dissent is diminished, but not entirely removed, by the fact, that in confining the principle to one class, he concedes that he is following local precedents, in opposition to the current of the other American authorities; and also, as we conceive, by the failure of the English courts to recognize, in the broad terms stated by him, the rule which he considers to be the only correct one; and its repudiation in two recent and well considered American cases.

§ 72. This classification constitutes the frame-work of all the subsequent remarks upon the clause of the statute now under examination ; but we have not regarded its preservation in a tabular form, throughout the succeeding pages, as essential or even desirable. For several reasons, it is more convenient to preserve the distribution of the text into chapters, with appropriate subdivisions ; and in order to avoid the confusion inseparable from two distinct tabular schemes, only the three general divisions will be retained in that form. But all the features of the classification will be preserved, as the next article will show, in the general rules for testing the application of the statute, in subordination to which the chapters have been arranged. And these features will moreover be constantly kept before the reader by incidental references in the text.

ARTICLE IV.

Rules by which to determine the validity of verbal promises under this clause of the statute.

§ 73. The general rules referred to in the preceding section, by which it is proposed to test the application of this clause of the statute, in accordance with the principles upon which our classification is based, constitute a series, nine in number. It is believed that every case giving rise to any well founded doubt, in which a correct decision has been rendered, excluding a promise from the operation of the statute, can be successfully defended, only upon a principle embodied in some one of these rules ; and will find its appropriate place as an illustration of the application of the rule, either directly, or in some of the ramifications to which its doctrine leads. If this proposition is correct, the corollary follows, that all cases, which maintain and necessarily depend upon principles not contained in any rule of the series, have been erroneously decided ; and if they have not been overruled by subsequent decisions, that they are of local authority merely, and cannot maintain a permanent footing in a general system of jurisprudence. These rules are designed to include directly, only

cases without the statute; but in discussing them, cases which have been held to be within the statute, will be cited in connection with the others, either as having been erroneously decided; or, when they were correctly decided, because they forcibly illustrate the principle upon which those not within the statute depend. And for the latter reason it has been found expedient to embrace both descriptions of cases within the terms of one of the rules.

§ 74. Pursuing the system of classification indicated in the preceding article, we commence with the first general division of cases not within this clause of the statute, being those which are not governed by it, although they fall within its terms. They consist of two classes, both of which are embraced within the terms of the first rule, namely:

RULE FIRST.

Contracts, the construction, validity, and evidence of which depend upon so much of the law merchant as the common law recognises, or the provisions of some other statute, are exceptions to the operation of this clause of the statute of frauds.

§ 75. The second general division, being cases which are not within this clause, because the terms of the statutory description of the promises to which it applies are only partially satisfied, consists of several classes. The first class, comprising those where the promise was not "special;" the second, those where the liability which the action is brought to enforce, grows out of something else than a "promise;" and the third, those where the promise, although it relates to the liability of a third person was not to "answer" therefor, may be conveniently included in one rule, which is as follows:

RULE SECOND.

The statute does not apply to implied promises; or to liabilities for deceitful representations, whereby the third person gained credit; or to promises to do some act for the security of a creditor of a third person, other than the absolute or contingent assumption of the debt by the promisor.

§ 76. The fourth class of the second general division consists of cases where there was no original liability for

a "debt, default or miscarriage," to which the undertaking of the promisor could be collateral. These are very numerous, and present several perplexing and some unsettled questions; hence a full examination of this subject will consume much time and space. It was said that this class admits of two subdivisions depending upon the different circumstances, which prevented the simultaneous existence of an original and collateral liability; and to each of these subdivisions a separate rule is assigned.

§ 77. Those cases where the question is whether the third person had incurred any liability corresponding with that assumed by the promisor, are governed by

RULE THIRD.

Where there was no antecedent liability of the third person, and the promise was founded upon a consideration moving to him, it is without the statute if the third person did not become liable to the promisee, together with the promisor; and vice versa, if he did so become liable, it is within the statute.

§ 78. Those cases where the third person had previously incurred a liability corresponding with that assumed by the promisor, but such liability had been discharged before the promise took effect, are governed by

RULE FOURTH.

A promise to assume an antecedent liability of a third person is without the statute, if the third person's liability had become extinct, at the time when that of the promisor came into existence.

§ 79. The fifth class of the second general division consists of those cases where there was nobody in the transaction, to whom the term "another person" could apply. They are taken out of the statute by the operation of a rule, the terms of which are well settled, although its practical application is attended with considerable embarrassment in some particular kinds of cases. It is as follows:

RULE FIFTH.

A promise to discharge the debt or duty of another is not within the statute, unless it was made to the person to whom the debt or duty was to be discharged.

§ 80. We now come to the third general division, which embraces cases not within this clause of the statute, although all the terms of the statutory description of the promises to which it applies are satisfied, because they are not within its spirit and intent. The classes which we have assigned to this general division, after a careful examination of the many conflicting decisions thereon, are five in number. The first consists of those cases where the promisor was, or had been previously liable for the same or a similar debt or duty; and they depend upon the following rule:

RULE SIXTH.

A promise is without the statute, if its effect was merely to remove some impediment to the enforcement by the promisee, of a liability already resting upon the promisor, in the same or some other form; although its fulfilment will necessarily result in the discharge of the precedent liability of a third person to the promisee.

§ 81. The second class of the third general division comprises cases where the promise was to be fulfilled out of the means of the debtor; and the principle applicable thereto is embodied in

RULE SEVENTH.

A promise to pay the pre-existing debt of a third person to the promisee is not within the statute, if the substantial effect of its fulfilment will be to discharge the debt, out of a fund furnished to the promisor by the debtor, in contemplation of which the promise was made.

§ 82. The third class has been limited, contrary to opinions expressed in a large number of the most respectable American authorities, which favor a much greater amplification of its terms, to cases where the debt assumed by the promise, was already a charge upon the property of the promisor. We think that, upon principle, all such cases are without the statute, whatever may have been the consideration of the promise; and such is, according to our understanding, the doctrine of the English decisions. But the American authorities seem to agree, in regarding the abandonment of the charge as a material element of the validity of the promise, and the rule has consequently been framed, in deference to this opinion, in the following terms:

RULE EIGHTH.

A promise to pay the debt of another is not within the statute, if its consideration was the abandonment to the promisor of a security for the payment of the debt, consisting of a lien upon or interest in property, to which the promisor then had a subordinate title.

§ 83. The fourth class of the third general division consists of cases where the promisor guarantied the payment by a third person of a debt transferred to the promisee by the promisor ; and the fifth class, of those where the debt guarantied was thereafter to be contracted through the agency of the promisor, acting as the factor of the promisee, under a del credere commission. Both of these kinds of promises, being pure guaranties, have been included in one rule, namely :

RULE NINTH.

A guaranty is not within the statute, if it was made upon a consideration moving wholly between the parties to it, and related to the payment of a debt or the performance of a duty by the third person to the promisee, the right to enforce which then first passed, or by the terms of the contract was thereafter to pass to him from or through the guarantor.

FIRST GENERAL DIVISION.

CASES WHICH ARE NOT GOVERNED BY THIS CLAUSE OF THE
STATUTE OF FRAUDS, ALTHOUGH THEY FALL WITHIN ITS
TERMS.

§ 84. It was said by a learned jurist, in an opinion from which an extract was copied in a previous section, that neither the statute nor the courts had made any exception of a promise which was an undertaking to answer for the debt or default of another.^(a) This remark is doubtless true of all those cases governed by the system of jurisprudence, which the statute was designed to affect; for even where the courts have excluded from its operation promises clearly within its letter, this was done by the process of construction, and in pursuance of the familiar maxim "*cessante ratione, cessat lex.*" But this part of the statute contains intrinsic evidence, that it was designed to effect a change in the *common law* only; and the rights and liabilities, depending upon that other system of jurisprudence, known as the law merchant, which, in a limited sphere, has been permitted by the courts to create a class of exceptions to the common law, naturally form also a class of exceptions to the statute. To these must be added those depending upon some subsequent statute, which in terms or by necessary implication, furnishes the only rule to determine their extent, and the sufficiency of the evidence required to establish their existence. The legislature having the same power to repeal the statute of frauds which it had to enact it, may clearly provide for the exclusion of particular contracts from the operation of its provisions. These two classes of cases, constituting the only *exceptions* to the statute, will now be briefly considered.

(a) Per Comstock, C. J., in *Mallory v. Gillett*, ante § 64.

CHAPTER THIRD.

CASES GOVERNED BY THE LAW MERCHANT, OR THE PROVISIONS OF SOME OTHER STATUTE.

§ 85. The two classes of cases belonging to this general division are governed by the first of the rules, by which the application of the statute is determined, as follows:

RULE FIRST.

Contracts, the construction, validity, and evidence of which depend upon so much of the law merchant as the common law recognises, or the provisions of some other statute, are exceptions to the operation of this clause of the statute of frauds.

ARTICLE I.

Contracts governed by the law merchant.

§ 86. The text books and the decisions have very little to say, respecting the effect of the statute of frauds upon liabilities regulated by the law merchant. It seems to have been assumed, rather than expressly held, that so much of that system as the common law recognized, remained unaffected after the passage of the act of the 29th of Charles the Second. But it is very evident that many of the liabilities created thereby, which the courts have continued to enforce, without requiring evidence of the character provided for in that act, come within its precise terms. Of this character is the liability of the acceptor by parol of a bill of exchange; who clearly undertakes by his acceptance to answer for the debt of the drawer. But it is well settled, that in the absence of a statute specially requiring the acceptance to be in writing, a verbal acceptance will bind; the cases so holding ignoring altogether the statute of frauds.(a) Many

(a) *Lumley v. Palmer*, Cases tempore Hardwicke, 74, and 2 Strange, 1000; Per Lord Kenyon, C. J., *Johnson v. Collings*, 1 East, 98; Per Gray, J., in *Exchange Bank v. Rice*, 98 Massachusetts, 288; *Ontario Bank v. Worthington*, 12 Wendell (New York), 593; *Julian v. Shobrooke*, 2 Wilson, 9.

other still more unequivocal instances, of liabilities created by the mercantile law, which are daily enforced by the courts, in direct conflict with the provisions of the statute of frauds, may be suggested; for instance that of an accommodation indorser, particularly of an unaccepted bill of exchange.

§ 87. All attempts to reconcile the principles, upon which many of these mercantile liabilities depend, with the statute are merely specious; and with respect to some of them the effort has not been made. Generally commentators and judges content themselves with simply adverting to the fact, that they are not within the statute, without assigning any reason for this opinion. Thus a standard work, speaking of a bill of exchange, says: "This security is in some respects preferable to many others of a more formal nature; for each of the parties to a bill, by merely writing his name upon it, as drawer, acceptor, or indorser, thereby impliedly guaranties the due payment of it at maturity, and the consideration, in respect of which he became a party to it, can rarely be inquired into; whereas, in the case of an ordinary guaranty, the statute against frauds requires the consideration to be expressed, and other matters of form, which frequently render an intended guaranty wholly inoperative." (b) But the principle that contracts of this character are not governed by the statute, is the only one, upon which their exclusion from its provisions can firmly rest, and it is entirely satisfactory in all respects.

§ 88. It would be useless to cite at length cases illustrating the rule, as the enforcement of such liabilities is matter of daily occurrence. In the authorities collected in the note, the principle that they constitute a class of exceptions to the statute of frauds, is either expressly stated or necessarily to be inferred. (c)

(b) Chitty on Bills, page 4.

(c) Bayley on Bills, 149 (2d American edition); Chitty on Bills, 4; 1 Parsons on Notes and Bills, 282, note; 2 id. 23; Casey v. Brabason, 10 Abbott's

ARTICLE II.

(Contracts governed by the provision of some other statute.)

§ 89. Upon a similar ground, a contract executed in accordance with the terms of another and subsequent statute, which is clearly designed to furnish the only rule, by which its sufficiency shall be tested, and its existence established, will be regarded as not being within the provisions of the statute of frauds. Thus in *Thompson v. Blanchard*, 3 New York (3 Comstock), 335, A. D. 1850, a motion was made to dismiss an appeal, taken from the Supreme Court to the Court of Appeals; upon the ground that the undertaking, given for that purpose, under the code of procedure of 1848, was not valid within the statute of frauds. The instrument was executed by three sureties and contained all the matters required by the code of procedure to be contained in such undertakings; but it was not under seal, nor did it express any consideration, it being a simple undertaking to pay costs, damages, etc., in the language of the code. The majority of the court held (Bronson, C. J., dissenting,) that the undertaking was sufficient, and the motion was accordingly denied. Gardiner, J., delivering the prevailing opinion, referred to the fact that it was expressly provided in the code of procedure, that when an appeal was perfected in accordance with the section reciting the contents of the undertaking, the proceedings should be stayed; and he added that the word "undertaking," used in the statute, meant, not an agreement but a promise, so that the decisions holding

Practice Reports (N. Y.), 368; *Pillans v. Van Mierop*, 3 Burrow, 1663; *Zellweger v. Caffé*, 5 Duer (N. Y.), 87; *Spann v. Baltzell*, 1 Florida, 301; *Turnbull v. Trout*, 1 Hall (New York), 336; *Parks v. Brinkerhoff*, 2 Hill (New York), 663; *Manrow v. Durham*, 3 Hill (New York), 584; *Barker v. Prentiss*, 6 Massachusetts, 430, 433; *Storer v. Logan*, 9 Massachusetts, 55, 58; *Spaulding v. Andrews*, 48 Pennsylvania, 411; *O'Donnell v. Smith*, 2 E. D. Smith (New York), 124; *Strobecker v. Cohen*, 1 Spears (South Carolina), 349; *Wilkinson v. Lutwidge*, 1 Strange, 648; *Fisher v. Beckwith*, 19 Vermont, 31; *Leonard v. Mason*, 1 Wendell (New York), 522; *Oakley v. Boorman*, 21 Wendell (New York), 588.

that the statute of frauds required the consideration to be expressed in writing, were not applicable because they expressly proceeded upon the ground that the statute used the word "agreement," instead of "promise" or "undertaking." He then added: "The legislature, in the section referred to, have said that an undertaking, to the effect prescribed, shall be effectual. We have no authority to add other conditions. If it be said that such an instrument would not be obligatory by the statute of frauds, the very obvious answer is, that the legislature of 1848 had the same power to restore the common law, as to this class of securities, that their predecessors had to abolish it. 2d. The undertaking prescribed by the 335th section is a statute security and not a common law agreement. Agreements which derive their obligation from the common law, and no others, are enumerated in our statute, and required to be made in writing, expressing a consideration. The objection I am considering, assumes that the undertaking in question falls within one of the classes of *agreements* there specified. It has however been generally supposed, that the assent of more than one party was essential to the validity of an agreement at common law." He concluded as follows: "The only consideration that can be imagined, for the undertaking of the defendant and his sureties, is the stay of proceedings upon, and the right to review the judgment obtained by the plaintiff. But this delay and privilege is the act of the law, against the wishes and in spite of the opposition of the respondent. What possible application, therefore, has the statute, designed to prevent frauds and perjuries in reference to common law contracts, to an undertaking, the contents and legal effect of which are written on the face of the statute? What fraud is to be suppressed or perjury avoided, by making this appellant certify, under his signature, to a consideration, which, if it exist at all, did not arise from the agreement of the parties, but from a law which this court, and all others, are bound judicially to notice? At most, it would be but cumulative evidence of the provisions of a statute."

§ 90. The question came again in another form before the same court in *Doolittle v. Dininny*, 31 New York, 350, A. D. 1865. This was an appeal from a judgment of the Supreme Court, recovered in favor of the plaintiff in an action founded upon an undertaking given on an appeal from a justice's judgment, in pursuance of another section of the code of procedure, containing substantially the same provision as the section under consideration in the preceding case. Among other objections to the judgment of the court below, the appellant insisted that the undertaking was void by the statute of frauds. The judgment was unanimously affirmed; Davies, J., who delivered the opinion, referring to *Thompson v. Blanchard* as decisive of this point. He said: "It was there held . . . that the statute of frauds applied only to common law agreements, where the consideration was the subject of mutual agreement between the parties; and not to instruments created under and deriving their obligation from special statutes, without the acceptance or assent of the party, for whose ultimate benefit they were given."

§ 91. The decision in *Thompson v. Blanchard* was followed in *Johnson v. Noonan*, 16 Wisconsin, 687, A. D. 1863, upon substantially the same facts, and under a statute similar to that of New York; but no reasons were specially assigned by the court, except that they preferred the opinion of the majority in the former case, to that of the chief justice.

SECOND GENERAL DIVISION.

CASES WHICH ARE NOT WITHIN THIS CLAUSE OF THE STATUTE, BECAUSE THE TERMS OF THE STATUTORY DESCRIPTION OF THE PROMISES TO WHICH IT APPLIES, ARE ONLY PARTIALLY SATISFIED.

§ 92. The system upon which this part of our work is based, now leads us to the consideration of those cases which are excluded from the provisions of the statute, because they fail to satisfy some term of the phrase, "any special promise to answer for the debt, default, or miscarriages of another person." It must, however, be said, at the outset, that this reason for holding that the promise is valid, without writing, will very rarely be found expressly declared in the cases themselves. The want of any recognized system of classification, to which allusion was made in the proper place, has compelled us to frame one, based upon our own deductions from the grounds upon which the decisions were placed; and in doing so we have, in most instances, been compelled to infer from the reasons assigned, to what general principle of construction, whether relating to the terms or the spirit of the act, each decision is to be referred. Sometimes it happens that the opinion delivered in a particular case, belonging to a class which we have assigned to this general division, purports to place the decision upon the general scope of the act, and the mischiefs against which it was directed, without regard to the fact, that in truth the terms of the statute were not satisfied. And the contrary state of things also occasionally occurs, in cases which we have placed in the third general division. Sometimes also two cases, necessarily depending upon the same principle of construction, will be made by their respective decisions to depend, the one upon the letter, the other upon the spirit of the act.

But these are simply phases of the confusion, prevailing upon nearly every question, arising in connection with the subject which we have undertaken to discuss; an undertaking which implies a duty, not only to endeavor to reconcile all conflicting opinions, but also, when they cannot be reconciled, to select those which are regarded as indicating the better rule; and, when necessary, to point out and correct errors. (a)

§ 93. It only remains to be said, by way of completing these prefatory remarks, that the course of the discussion will sometimes make it necessary to consider in this general division, cases, and perhaps classes of cases, which properly depend upon the spirit, rather than the terms of the statute. For in pursuing the examination of the principles involved, throughout their various ramifications, and the corollaries resulting from them, as well as the qualifications, limitations, and exceptions to which they may be subjected, the discussion will occasionally shift from the letter to the spirit of the act, and then back again.

(a) Instances of the prevailing confusion and conflict of authority, which render the task of classification so arduous, and its result so unsatisfactory, will occasionally be given in the text or in the notes. As peculiarly germane to one of the observations contained in the foregoing section, we will here refer to *Pratt v. Humphrey*, 22 Connecticut, 317, a case which has already been cited upon one point involved, and will be hereafter cited at length upon the other. Upon the latter point the decision was quite remarkable; as a promise by executors to pay certain creditors of the plaintiff, made in consideration of his forbearance to collect a debt due to him from the estate, was excluded from this clause of the statute, because it was made to the plaintiff, and not to his creditors; but the court put the decision chiefly upon the ground, that the object and intention of the statute showed that it was not intended to embrace such promises. But in no class of cases is it so clear, that the reason for the prevailing rule is, that the *words* of the act do not embrace the promise, as in those where it was made to the debtor; and the conflict respecting the effect of that ruling in particular cases, grows entirely out of the fact, that it is contended that the spirit of the act does embrace them.

CHAPTER FOURTH.

CASES DEPENDING UPON THE WORDS "ANY SPECIAL PROMISE TO ANSWER."

§ 94. The cases included within the first three classes of the second general division, being those where it has been held that the statute does not prevent a recovery upon oral evidence, because the circumstances do not satisfy some one of the first five words of the phrase under examination, are comparatively few in number; so that they may all be conveniently considered together in one chapter, and governed by one rule, namely:

RULE SECOND.

The statute does not apply to implied promises; or to liabilities for deceitful representations, whereby the third person gained credit; or to promises to do some act for the security of a creditor of a third person, other than the absolute or contingent assumption of the debt by the promisor.

ARTICLE I.

Where the promise was not "special."

§ 95. The term "special promise," has a well recognized meaning in the law: it is synonymous with express promise, and denotes a promise which has been, in fact and in express terms, made by the promisor, as contradistinguished from an implied promise. Implied promises arise, without the actual assent of the promisor, by operation of law, being "such as reason and justice dictate, and which, therefore, the law presumes that every man has contracted to perform, and upon this presumption makes him answerable to such persons as suffer by his non-performance." (a) The object of inserting the qualifying adjective in the statute, seems to have been to leave implied promises

(a) 3 Blackstone's Commentaries, 158.

unaffected by its provisions.(b) However, one learned judge has adopted the scholastic, rather than the legal definition of the expression, for he says: "The word 'special,' according to Walker, means 'denoting a sort, or species, particular, peculiar, appropriate, designed for a particular purpose.' The statute was designed to avoid only such promises as are especially and particularly to answer for the debts of others, not those which, while incidentally assuming the responsibility for such debts, are wholly or principally for the purpose of performing some distinct obligation of the promisor." (c) But, although the conclusion to which the learned judge was led by his definition is unobjectionable, the profession are generally agreed that the expression "special promise" is used in the statute merely in contradistinction to an implied promise; and upon that understanding some distinctions have been made, which in their day were, and in some cases may yet be important, though, in most of the particular instances presently cited, the action would be now sustained upon other principles.

§ 96. The point was thus adjudged in one of the earliest reported American cases, *Smith v. Bradley*, 1 Root (Connecticut), 150, decided by the Superior Court in the year 1790, as follows: "Action of the case declaring—That on the 29th of April, 1781, the defendant received of the plaintiff a pay-table order for 200*l.* in state bills, which he received of Col. Champion, and was accountable to him for; that the defendant, in consideration thereof, promised to account to Col. Champion for it; that he hath

(b) *Furbish v. Goodnow*, 98 Massachusetts, 296. In *Elder v. Warfield*, 7 Harris and Johnson, 391, Buchanan, C. J., said, that where the question arose in the case of goods, etc., furnished to the third person, the promise is within the statute, if the action cannot be sustained upon the common counts, but the plaintiff must declare specially upon the promise; and this appears to have been the view of Serjeant Williams, according to the original note to the case of *Forth v. Stanton*, 1 Saunders, 210.

(c) Per Strong, J., in *Durham v. Manrow*, 2 New York (2 Comstock), 538.

never accounted to said Champion for it ; but the plaintiff hath been compelled to pay said Champion for said order ; damage 133*l*. Issue to the jury on the plea of non-assumpsit, and verdict for plaintiff. Defendant moves in arrest the insufficiency of the declaration, being upon a parol promise made in A. D. 1781, more than three years before the date of the plaintiff's writ. And, by the statute against frauds and perjuries said action is not maintainable. Judgment—That the motion in arrest is insufficient. By the Court.—It is no cause of arrest that the jury have found their verdict upon insufficient evidence, for they are judges of the weight of evidence. The consideration of the promise is laid to have been in April, A. D. 1781 ; but the promise did not arise until the plaintiff was compelled to pay Col. Champion said order, and it was a promise or obligation which the law raised from the natural equity of the transaction, and not within said statute."

§ 97. So in *Goodwin v. Gilbert*, 9 Massachusetts, 510, A. D. 1813, the plaintiffs had assigned and conveyed to the defendants, by deed-poll, certain indentures and interests in real estate, by the terms of which the plaintiffs were to pay certain sums of money to a third person, the deed specifying that it was subject to all the conditions, etc., mentioned in the conveyances to the plaintiffs ; and the defendants had taken possession of the premises. An action of assumpsit was brought to charge the defendants with the payment of the moneys ; and, on a verdict taken for the defendants, subject to the opinion of the court, it was insisted in their behalf, that the promise was within the statute of frauds. But the Court, after saying that when the grantee enters under a deed-poll, certain duties being reserved to be performed, although no action lies upon the deed, the grantor may maintain assumpsit for the non-performance of the duties reserved, added : "It was objected that this was an agreement concerning an interest in lands ; and that no memorandum being signed by the party, the case was within the statute of frauds. But where the law raises the promise, it is not within the stat-

ute. The same answer may be made to the objection that it was a promise to pay the debt of another, and not in writing." So the verdict was set aside, and a verdict entered for the plaintiffs.

§ 98. A similar decision was made in *Pike v. Brown*, 61 Massachusetts (7 Cushing), 133, A. D. 1851. There it was held that where a deed describes the land conveyed, as being subject to a mortgage previously executed by the grantor, and expresses that the amount due upon the mortgage is part of the consideration, and that the deed is on condition that the grantee shall assume and pay the debt secured by the mortgage; an action of assumpsit can be maintained by the grantor who has been compelled to pay the mortgage debt; the objection that the promise of the grantee was within this clause of the statute, not being tenable because it was made to the debtor himself. "Besides," the Court added, "promises implied by law are not within the statute."

§ 99. And it would seem, although the question arose under a kindred statute,^(d) that the decision in *The Cabot Bank v. Morton*, 70 Massachusetts (4 Gray), 156, A. D. 1855, turned in part upon the same point, the court holding there that the warranty of genuineness of the signature of the indorser of a promissory note, which arose in favor of the bank, against a person who offered the note for discount was an implied promise, and therefore not within a statutory provision, requiring certain representations and assurances respecting third persons, to be in writing.

§ 100. So in *Allen v. Pryor*, 3 A. K. Marshall (Kentucky), 305, A. D. 1821, it appeared that the plaintiffs had sold goods to the firm of Gill and Bainbridge, and by the terms of sale the purchase-price was to be secured by an indorsed note, which they were to furnish; and that they had made a note, payable to the defendant, which he "assigned" to

(d) The Massachusetts statute referred to, post, § 105, note.

the plaintiff in payment of the purchase-price; and the question was whether this "assignment" created a liability. The majority of the court, affirming a judgment for the plaintiff, held that the law would imply from the assignment a promise that the assignor would pay the amount of the note, if it could not be collected from the makers; and that inasmuch as this liability of the defendant "does not arise from any express promise of his, but it results from a promise which the law implies, from the fact of his having assigned the note on a sufficient consideration, the statute of frauds never has, and we suppose never ought to be construed to apply to such a promise." (e)

§ 101. And in *Stocking v. Sage*, 1 Connecticut, 519, A. D. 1816, the defendants were owners of a vessel, of which the plaintiff was the master; and while in a foreign port, the plaintiff contracted with K. & Co. to go to another place, and there purchase and transport certain cattle for them, upon which contract he received an advance from them; and on the return voyage he was compelled to put into another port, where he sold the cattle to pay freight and charges, and returned to his home port. When he had arrived there, the plaintiff claimed the right to retain the proceeds of the cattle, until he could settle with K. & Co.; but the defendants insisting that they were entitled to the money, he paid it to them on their verbal promise to indemnify him against any liability to K. & Co., including costs and expenses; and they having sued the plaintiff at the foreign port, he was put to large expenses in defending the suit, in which he was finally

(e) In some of the United States, the mere assignment of an evidence of debt is construed as implying a guaranty of payment or collection, under conditions more or less restricted. Other instances of this rule will appear hereafter. In the particular case, it would appear, from the statement of facts, that the defendant actually indorsed his name upon the note, but, as it was not negotiable, the court treated the transaction as a mere assignment. Throughout the whole case, the words "assignment" and "indorsement" are used as convertible terms.

successful; and now brought this action for reimbursement, and recovered in the court below. The judgment was affirmed upon a writ of error, the prevailing opinion holding, with respect to the question arising under the statute of frauds, that the law would imply an agreement on the part of the principal, to reimburse the agent, in such a case as this, and that "such implied agreement is not within the statute of frauds and perjuries." (f)

ARTICLE II.

Where a liability for a third person's debt or default arises out of a deceitful representation and not out of a "promise."

§ 102. The statute, being confined in terms to *promises*, has no application to an action sounding in tort, and founded upon a deceit practised upon the plaintiff, by a false and fraudulent representation, made by the defendant, concerning the character or pecuniary circumstances of another, whereby the plaintiff was induced to give him credit. As the result of a recovery, in such an action, will always practically charge the defendant with the debt of another, or with damages for his default or miscarriage, a

(f) Another instance of an implied promise, which is not within the statute, is that of an assignee for the benefit of creditors. *Drakeley v. Deforest*, 3 Connecticut, 272; *Hitchcock v. Lukens*, 8 Porter (Ala.), 333; *Hughes v. Stringfellow*, 15 Alabama, 324. Perhaps, also, some of the questions, to be considered in the next volume respecting the effect of performance of a special promise which is within the statute, may in part depend upon the same principle. Thus in *Gray v. Hill, Ryan and Moody*, 420, A. D. 1826, the plaintiff declared specially upon an agreement to assign to him a lease of certain premises, in consideration of his putting them in repair, averring that he did repair them, etc., and there were also counts for work and labor and money expended. At the trial, it appeared that the promise was verbal, and it was objected that the plaintiff could not recover under the statute of frauds; but Best, C. J., said, that although the fourth section of the statute was decisive against the plaintiff upon the special count, he might recover upon the others; that the law would "imply a promise, not touched by the statute, nor within the danger of perjury guarded against by it." In *Kelsey v. Hibbs*, 13 Ohio, N. S. 340, cited in a subsequent chapter, the court appear to have overlooked the statutory requirement that the promise must be special.

grave question arose, coeval with what is generally regarded as the establishment of the principle, that an action could be maintained for a false recommendation, whether the statute of frauds did not require, if not in terms, at least by necessary implication, that the recommendation should be proved by some writing. The first adjudged case in which this species of action was sustained is *Pasley v. Freeman*, 3 Term Reports, 51, decided in 1789, where each of the judges delivered opinions seriatim and at great length. There is no allusion in the prevailing opinions to the statute of frauds; but Grose, J., founded one of his arguments against sustaining the action, upon this provision of the statute.

§ 103. But in *Eyre v. Dunsford*, 1 East, 318, A. D. 1801, the point that the statute did not apply was distinctly determined. This was an action for falsely and fraudulently representing one Thompson, to be a person whom the plaintiffs might safely trust, in consequence of which they sold him goods upon credit; and the plaintiffs having had a verdict, a rule nisi was obtained for a new trial, and was supported in part on the ground, that the action was calculated to trench upon the statute of frauds. But the rule was discharged; and Lord Kenyon, in his opinion, held that the statute has no relation to such cases. "It raises," he said, "certain legal presumptions of fraud, from the want of certain formalities in contracts and other transactions, against which it guards by avoiding them; but that has no application to actions founded on actual fraud and deceit, in order to recover damages by the party grieved."

§ 104. The question came again before Lord Kenyon and the other justices of the King's Bench at a subsequent term in the same year, (1801,) in the case of *Haycraft v. Creasy*, 2 East, 92. There the defendant was clearly the dupe of a female adventurer named Robertson, who had induced him not only to lend her his acceptances to the amount of 2,000*l.*, but to recommend her to the plaintiff as worthy

of credit; and the only ground upon which the action could be maintained, with any plausibility, was, that in answer to inquiries whether he had any knowledge of her affairs, except from hearsay, he had said that he knew of his own knowledge that she was a lady of rank and fortune, whom the plaintiff might safely trust; whereas in fact he had known her as a poor school mistress, and relied entirely upon her own statements, respecting her sudden accession to wealth. The plaintiff having recovered a verdict, a rule nisi to set it aside was argued on each side by four of the most distinguished counsel at the English bar, among them, Sir Edward Law, afterwards Lord Ellenborough, for the defendant; who argued that if a particular phrase would render a man liable for the debt of another, it militated as much against the spirit of the statute, as if words of direct guaranty were used; and all the mischief would be let in which the statute was made to prevent, if a verbal representation could be made the foundation of such an action. (a) But Lord Kenyon repeated what he had said upon this point in *Eyre v. Dunsford*; and although he was in the minority in this particular case, the other judges holding, against his opinion, that the action could not be maintained, the decision was put upon the ground that there was no mala fides in the defendant, his assertion being evidently intended only as a very strong expression of his confidence in the woman; and it is now well settled that the statute does not apply to such cases. (b)

(a) According to the report in *East*, the counsel for the defendant insisted that no action of this character should be sustained. But Lord Campbell, in the third volume of his *Lives of the Chief Justices* (page 87 of the American edition), states the argument of Law to have been, that to make the defendant liable without actual deceit, would be to treat him as a surety for Miss Robertson, without any written guaranty. Lord Campbell adds that the mortification which Lord Kenyon suffered at being overruled in this case by the puisnes, was supposed to have hastened his death.

(b) See the cases cited, post, §§ 106, 107, 110, 111, and also *Adams v. Anderson*, 4 *Harris and Johnson* (Maryland), 558; *Upton v. Vail*, 6 *Johnson* (New York), 181; *Ewins v. Calhoun*, 7 *Vermont*, 79.

§ 105. There has been a great difference of opinion among the English judges, upon the question whether this ruling stands upon a solid foundation of reason and expediency; and some of them have expressed a very decided opinion, in favor of the interference of the legislature, to require that no such representations shall be actionable, unless they were made in writing; (c) which opinion in the course of time prevailed. In the year 1828 was enacted by parliament the statute, 9 George IV, chapter 14, commonly called Lord Tenterden's act, designed to bring this class of cases, as well as others, to which it was thought that the same rule might be properly applied, within the principle of the statute of frauds; by providing that a memorandum in writing should be necessary, in order to maintain an action for deceitful representations respecting the ability or character of a third person; or upon a promise to pay a debt contracted during infancy; or a debt barred by the statute of limitations. And similar statutes have been enacted in some of the United States. (d)

(c) Per Lord Alvanley, C. J., and Chambre, J., in *Tapp v. Lee*, 3 Bosanquet and Puller, 367, post, § 106. Per Lord Eldon, Chancellor, in *Evans v. Bicknell*, 6 Vesey, 172, on page 186, and in *Ex parte Carr*, 3 Vesey and Beames, 108.

(d) Alabama, Indiana, Kentucky, Maine, Massachusetts, Michigan, Missouri, Oregon, Vermont, and Virginia. For these statutes, and section six of Lord Tenterden's act, see the schedule prefixed to this volume. It is foreign to the purpose of this work, to enter into any detailed examination of the provisions of these statutes, or of the cases under them, as they have nothing in common with that part of the statute of frauds, which forms the subject of our examination, except that they require a memorandum in writing. Still they are sometimes spoken of as provisions of the statute of frauds; and they are generally contained in the same chapter as the sections of the statute of which this work treats. The following cases have been decided, upon those parts of the statutes in question, which refer to false and fraudulent representations, viz.: In England, *Lyde v. Barnard*, *Tyrwhitt and Granger*, 250; *Haslock v. Ferguson*, 7 Adolphus and Ellis, 86; *Swann v. Phillips*, 8 Adolphus and Ellis, 457; *Turnley v. McGregor*, 6 Scott, N. R. 906, 1 Dowling and Lowndes, 506, and 6 Manning and Granger, 46; *Wade v. Tatton*, 18 Common Bench, 371, 2 Jurist, N. S., 491, and 25 Law Journal, O. P., 240; *Sheen v. Bumpstead*,

§ 106. But before the passage of the act in question, the courts had been required to exercise no little vigilance, to prevent the happening of the result, which was predicted by the opponents of the rule established in *Pasley v. Freeman*, to wit, that it would lead to an evasion of the statute of frauds, by suing on verbal guaranties, under the pretence of bringing actions for deceit. Such an action, or at least one which was very strongly open to the suspicion of being such an action, was brought in the Common Pleas, almost in the infancy of the doctrine, and was decided in 1803. It is reported under the title of *Tapp and another v. Lee*, 3 Bosanquet and Puller, 367. The declaration counted upon a fraudulent representation, concerning the character and credit of one Brunel; and it appeared upon the trial that Brunel, having purchased goods from the plaintiffs on credit, on three previous occasions, to the amount of 28*l.*, applied for more goods to the amount of 28*l.* 4*s.* 9*d.*; and the plaintiffs, being unwilling to trust him further, without an inquiry into his character and circumstances, sent their servant to make inquiries from the defendant, who thereupon made the representations complained of; and upon the servant's report, the plaintiffs gave Brunel credit for the goods. Soon afterwards, the defendant inquired from the servant if the plaintiffs had trusted Brunel; and on being answered that he had been trusted, in consequence of what the defendant had said, replied, "I did not think you was such a cake." It was further shown, that the defendant himself had refused to trust Brunel, who was an uncertifi-

8 Jurist, N. S., 702, 10 Weekly Reporter, 740, 2 Hurlstone and Coltman, 193, 10 Jurist, N. S., 242, 32 Law Journal, Exch., 271, 11 Weekly Reporter, 734, and 8 Law Times, N. S., 832. In the United States, *Warren v. Barker*, 2 Duvall (Kentucky), 155; *Jasigi v. Brown*, 17 Howard (U. S.), 183; *Hearn v. Waterhouse*, 39 Maine, 96; *Cabot Bank v. Morton*, 70 Massachusetts (4 Gray), 156; *Norton v. Huxley*, 79 Mass. (13 Gray), 285; *Kimball v. Comstock*, 80 Mass. (14 Gray), 508; *Wells v. Prince*, 81 Mass. (15 Gray), 562; *Mann v. Blanchard*, 84 Mass. (2 Allen), 386; *McKinney v. Whiting*, 90 Mass. (8 Allen), 207; *Huntington v. Wellington*, 12 Michigan, 10; *Crown v. Brown*, 30 Vermont, 707.

cated bankrupt, as the defendant knew. The jury found a verdict for the plaintiffs, and a rule nisi to set it aside having been obtained and argued, all the judges delivered opinions. Lord Alvanley, C. J., before whom the cause had been tried, after expressing a wish that the legislature would provide that in such cases the representations must be in writing, which, he said, it was clearly settled by the previous cases, was not necessary; remarked, that at the trial he had pointed out the circumstances, from which it appeared probable that the inquiry made by the plaintiffs was intended as a trap; but the jury had passed upon the question, and it could not be called a verdict against evidence; still he was not satisfied with it, and thought that the defendant ought to have a new trial on payment of costs. And with him all the judges agreed, Rooke, J., and Chambre, J., saying, that there was reason to believe that the plaintiffs intended to practice a trick upon the defendant, and that he ought to be allowed to take the opinion of another jury upon terms; and the rule was accordingly made absolute upon payment of costs. Undoubtedly the circumstance which made the most impression upon the minds of the judges was, that the plaintiffs had previously given Brunel credit; and in fact it is to be inferred from the report, that the former debt was unpaid, at the time when the purchase in question was made.

§ 107. The next case was *Hamar v. Alexander*, 5 Bosanquet and Puller, 241, decided A. D. 1806, also in the Common Pleas. It presented the feature that the fraudulent representation was coupled with a verbal guaranty of payment of the debt, which the plaintiff was permitted to separate from the guaranty so as to recover upon the representation alone. The declaration stated that the defendant falsely, fraudulently, and deceitfully represented to the plaintiff "that one Leo was a good man, and might be trusted for any amount;" averring that he knew it to be false, and that on the faith of the representation the plaintiff had sold Leo goods. At the trial the

plaintiff proved the representations as laid in the declaration ; and that the defendant added, "that if Leo did not pay for the goods he would." It was also proved that the defendant knew that Leo was in bad circumstances, and that he procured the credit for him, in order that the goods might be consigned to a house with which the defendant was connected ; and one Crompton was also concerned in the purchase, as a broker. On the part of the defendant it was objected, that the representations having been accompanied by a promise to pay, which was void under the statute of frauds, the action could not be sustained for the deceit ; because the injury might have arisen from the void promise, and not from the false representations. But the plaintiff had a verdict, and the defendant obtained a rule nisi for a nonsuit on that ground. Sir James Mansfield, C. J., delivered the opinion of the court, in which he said, that, although it was true that it was impossible to determine how much mischief was done by the representations, and how much by the void promise, he was nevertheless of the opinion that, upon the whole, the verdict ought to stand. "Independent of the promise," he said, "I think this is clearly a case, upon which an action might be-maintained, if the case of *Pasley v. Freeman* had never been heard of. Here a gross cheat was meditated, and I am by no means certain that the parties might not have been indicted for a conspiracy." Then, after dwelling further upon the fraudulent character of the conduct of all the parties to the cheat, he added : "The only question then is, whether the addition of this promise, that if Leo did not pay, the defendant would, will prevent the plaintiff from having a right to support this action. I think that it will not. There is no proof that the plaintiff ever considered the defendant as his debtor, or ever called on him for the money, or relied on his promise in the least degree. In the next place, we must suppose every man to know the law ; and if the plaintiff was acquainted with the law, he must have known that the defendant's promise was worth nothing, and could have given no credit to him upon it. He cannot have con-

sidered it in any other light than as a mode of expression by which the defendant intended more strongly to express his opinion of Leo's circumstances. There being, therefore, no objection on the ground of this promise being added to the other circumstances, we are of opinion that the verdict is right."

§ 108. It would seem from the remarks of the Chief Justice, that the test of the right to recover in such a case, is whether the plaintiff relied upon the guaranty, or upon the representation alone. Much stress was laid upon the circumstance that this particular verbal guaranty was void as matter of law, being conditional by its terms;(e) but, upon the whole, it is fairly to be inferred from the opinion, that in all cases of this character the guaranty may be separated from the representation, and the question left to the consideration of the jury, whether the plaintiff relied upon the guaranty, or upon the representation, even in a case where the statute did not render the former void. But in *Gallager v. Brunel*, 6 Cowen, 346, and in *Shaw v. Stine*, 8 Bosworth, 157,(f) the New York courts have held that even if the plaintiff relied upon the guaranty, he is entitled to maintain the action, if he relied also upon the false representations.

§ 109. The next case, which arose in the King's Bench, was *Smith v. Harris*, 2 Starkie, 47, tried at nisi prius in 1817, before Lord Ellenborough. As this case has apparently been misunderstood by some commentators, we transcribe the language of the report, omitting only some matter irrelevant to this inquiry. "This was an action on the case against the defendant, for a fraudulent representation that one Hollingwood was a trustworthy man and a man of property, and that his wife had an annuity of 50*l.*; in consequence of which the plaintiff was induced to give Hollingwood credit; whereas he was in insolvent circumstances." Hollingwood being called as a witness,

(e) See post, chapter vii.

(f) Post, §§ 110, 111.

there was an objection to his competency, which the Chief Justice overruled, and he then testified "that the defendant had told the plaintiff, that he might lend him (Hollingwood) 20*l.* or 30*l.*, and that he would be perfectly safe; and that he (the defendant) would see the plaintiff paid.

Lord Ellenborough. These cases come out almost always according to the truth. A promise having been made to guaranty the plaintiff, which is within the statute, there being no note in writing, he brings an action for the misrepresentation. This is nothing more than a guaranty within the statute of frauds. Plaintiff nonsuited." There is nothing in this case, as reported, to indicate that Lord Ellenborough intended in the slightest degree to question the rule as laid down in the previous cases, particularly *Hamar v. Alexander*. It would be sufficient to distinguish the two cases, that there appears to have been no proof of a scienter in *Smith v. Harris*; but, apart from that criticism, the language of the defendant, as given by the witness, indicates rather an expression of opinion respecting his circumstances, or his honesty, than the affirmation of an existing fact; and it is evident that the so called representation was entirely subordinate to the guaranty, instead of being independent thereof, so as to be capable of being made the foundation of a distinct remedy.

§ 110. The case of *Gallager v. Brunel*, 6 Cowen (New York), 346, decided A. D. 1826, presents features in some respects similar to those of each of the two cases last cited, although neither of them was referred to in the argument or in the opinion; which is the more remarkable, because the second count of the declaration appears to have been framed, with the hope of bringing the case within the opinion of Sir James Mansfield, in *Hamar v. Alexander*. There the first count of the declaration averred, in substance, that C. and H. proposed to purchase from the plaintiffs a quantity of cotton, at a certain price, part to be paid for in cash, and part by their notes, indorsed by the defendant at four months; that they were

then unable to pay for the cotton, and that the plaintiffs were unwilling to sell it on their sole credit; and that the defendant, well knowing these facts, but contriving, etc., falsely and deceitfully represented to the plaintiffs, that he was willing to indorse the proposed note; and thereby induced the plaintiffs to sell and deliver them the cotton; whereas, in truth, he was not willing, and did not mean or intend to indorse the note, whereby, etc. The second count was in substance the same, except that it averred, that C. and H. were in bad credit, and unfit to be trusted; that the defendant, well knowing this, and fraudulently intending to enable C. and H. to obtain possession of the cotton, and convert it to their own use, without paying the plaintiffs for it, falsely, fraudulently, and deceitfully represented to the plaintiffs, that if they would sell the cotton to C. and H., the defendant would become answerable to the plaintiffs for so much of the price as should be unpaid, by indorsing the notes of C. and H., etc. The defendant demurred to the declaration, and the court gave judgment for the defendant upon the demurrer, Woodworth, J., delivering a *per curiam* opinion. He said that the declaration was bad in substance, for not averring that a note was ever made by C. and H., and presented to the defendant for indorsement; but, as the decision upon that point alone would only postpone the question, he would consider it upon its merits. Even supposing, he said, that the contract was in writing, the plaintiffs cannot say that they have the election to turn the action into one for deceit; unless the case is such, as not only to render the party liable, upon the contract, but also to sustain an action for deceit. "For example," the learned judge said, "suppose A represents B to be solvent, knowing it to be false, whereby B obtains credit; but notwithstanding this representation, the seller takes from A his written stipulation to guaranty the payment. In this case I perceive no objection to a creditor's election of the remedy." But, he added, the intention of the party not to fulfil the contract, is not one of the fraudulent acts which render him liable in an action for deceit; in such cases the

general ground of liability rests upon the affirmation of a fact as true, which, at the time, he knows to be false, and by means whereof, credit is obtained. Here there was no necessity of relying upon the representation or promise of the defendant. The plaintiffs had only to insist that the note should be drawn and indorsed, *pari passu* with the delivery of the goods; hence if they suffer, it is owing to their own negligence and misplaced confidence. He then cites several of the previous cases, in all of which the gravamen of the action was the false affirmation of an existing fact; not a promise to do a future act, at that time not intended to be performed, and which, notwithstanding the intent, might or might not be performed.(g)

§ 111. The rule intimated in the opinion of Woodworth, J., in the case last cited, was fully recognized and adopted in *Shaw v. Stine*, 8 Bosworth, 157, decided in the New York Superior Court, A. D. 1861. There the action was to recover the value of goods sold by the plaintiffs to Cohen & Mendel, of Cincinnati, upon fraudulent representations of the defendants respecting their responsibility; and the proof showed that after the representations were made, one of the plaintiffs, who transacted the business on behalf of his firm, said that he was not satisfied; and the defendants then offered and agreed to indorse Cohen & Mendel's note, on being paid two and a-half per cent therefor. The goods were then delivered, but the note given by Cohen & Mendel therefor was not paid, nor was it indorsed by the defendants. Upon the trial, the judge charged the jury that if the plaintiffs relied on the indorsement, and not on the representations, they should find for the defendants; but if the goods were sold upon the faith of the representations, they should find for the plaintiffs; and he refused to charge, as requested by the plaintiffs' counsel, that if the representations in any degree contrib-

(g) See *Boyd v. Stone*, 11 Massachusetts, 342, A. D. 1814, where there was a similar ruling in a case arising under the fourth clause of this section.

uted to induce the plaintiffs to sell the goods, the plaintiffs were entitled to recover. The defendants had a verdict, and the judgment thereon was reversed upon an exception taken to the refusal to charge; the Court saying that the charge seemed to contain an intimation to the jury, that the plaintiffs could not recover, unless they sold the goods solely upon the faith of the defendants' representations; and to leave it to the jury to determine, upon which one of the inducements the plaintiffs parted with their property. The opinion (per White, J.) states the rule as follows: "A true test in such cases may be found in the inquiry, whether the plaintiff would have sold the goods if the false representations had not been made? If he would, then the false representations did not contribute to the sale, for he would have made the sale without them. But if he would not have sold them without the representations, then they contributed to the sale; and the party making them is responsible for the damage which the plaintiff suffered, notwithstanding that other equally powerful motives may have influenced his mind at the same time in the same direction, and without the existence of which he would not have come to the conclusion to sell. It is plain that each one of several concurring considerations or motives, may be so necessary to induce the performance of an act, that, in the absence of any one of them, the act would not be done; and when they are all thus necessary, and all concur, each one of them must be deemed to have aided in producing the act and its consequences. In the case before us, the two things, the representations made by the defendant respecting the responsibility of Cohen & Mendel, and the supposed security furnished by the indorsement of Stine & Mendel (the defendants), may have *both been necessary* to the conclusion to which the plaintiffs finally came, to sell the goods to the Cincinnati firm. Neither separately might have been a sufficiently powerful inducement, while both united would be." (h)

(h) See also *Thompson v. Bond*, 1 Campbell, 4, where it was held that a fraudulent representation that the party to whom goods have been delivered was authorized to pledge a third person's credit therefor, will not prevent a recovery in assumpsit against the party himself, if the seller in fact gave credit to the person to whom the delivery was made.

ARTICLE III.

Where a promise has been made to do some act, tending to the discharge of a liability of a third person to the promisee, but not directly "to answer for" the same.

§ 112. The expression "to answer for," apparently implies that the cases for which the statute intended to provide, are those where the promisor enters into a direct undertaking, to assume a liability resting upon a third person, either absolutely or in case of the latter's default. Consequently a promise is not within the language of the statute, which does not in terms bind the promisor to discharge such a liability, although it contemplates the performance of some act tending to effect such a discharge, and the damages for its breach would be measured by the amount of the demand. Whether such promises, although not strictly within the letter, are not so far within the meaning of the statute, as to be included within its provisions, is a question of considerable difficulty, which has been much debated; but the weight of authority apparently favors the negative conclusion.

§ 113. Thus, in a *nisi prius* case which has been much criticised, *Jarmain v. Algar*, 2 Carrington and Payne, 249, and *Ryan and Moody*, 348, decided A. D. 1826, the declaration stated that one Flack was indebted to the plaintiff; and for the purpose of recovering his debt by action, the plaintiff had caused to be issued against him a latitat, indorsed for bail for 34*l.*; whereupon, in consideration that the plaintiff would forbear to arrest Flack upon that writ, the defendant undertook to execute a bail bond for Flack, upon process to be issued to Sussex or Middlesex at the suit of the plaintiff, when tendered to him, within one week from the time of making the promise. The declaration then averred the issuing of process to Middlesex; the tender of a bail bond to the defendant; and his refusal to execute it. At the trial, the plaintiff proved a written undertaking of the tenor stated in the declaration; but it contained no expression of the consideration. The defendant's counsel asked for a nonsuit on two

grounds, namely, that the writing was insufficient within the statute of frauds, and that the plaintiff had failed to prove a sufficient tender of a bail bond for execution by the defendant. Abbott, C. J., said: "As at present advised, I think this undertaking is not within the statute of frauds, and is not a promise to answer, etc., within the meaning of its provisions." With respect to the other point he thought that it had better be reserved till after the verdict; and the jury having found for the plaintiff, he held that the plaintiff had failed to prove the tender, and on that ground directed that a nonsuit should be entered, with leave to the plaintiff's counsel to move to enter a verdict for the plaintiff; but the report states that no motion was ever made. (a)

§ 114. The case of *Bushell v. Beavan*, 4 Moore and Scott, 622, and 1 Bingham's New Cases, 103, decided in the English Common Pleas in 1834, involves a similar principle; and it is of much greater weight as authority than the preceding; as it was elaborately argued, and carefully considered by a full court. The action was brought to recover damages, for the failure to procure the signature of one Macqueen to a written guaranty; and also upon a guaranty of the same general tenor signed by the defendant himself; but, as the court were with the defendant upon the last mentioned cause of action, the first only will be referred to here. At the trial it appeared that the plaintiffs were the owners of the ship *Warrior*; and she, needing some repairs, had gone into the dock for the purpose of having them made; the plaintiffs and one Sempill having previously entered into a charter-party for the hire of

(a) The case of *Elkins v. Heart*, Fitzgibbon, 202, A. D. 1731, was similar to this, being an action upon a promise that J. G. should not go beyond the kingdom without paying a debt due from him to the plaintiff, made in consideration of forbearance in an action brought against the said J. G. by the plaintiff. The plea was that there was no note in writing, etc., to which the plaintiff demurred. The report says: The court "inclined that there was a new consideration, and therefore it was not for the debt of J. G., and so not within the statute; sed adjournatur."

the ship to Sempill, after the repairs should be completed. In fact the ship was not ready for sea within the time provided for by the charter party; and for that and other reasons a dispute arose between the plaintiffs and Sempill, in consequence of which the plaintiffs refused to allow the ship to go to sea. After considerable negotiation, the dispute was finally settled, Sempill securing the plaintiffs satisfactorily for six months hire of the ship; and in addition it was one of the terms of settlement, that the defendant should procure T. P. Macqueen to sign a certain document, which was drawn up and assented to by the parties; by the terms of which, after reciting that the charter party had been entered into; that Sempill had secured the payment of the freight for the six months, and was about to leave England in the ship; Macqueen, in consideration thereof, agreed to guaranty "the due and faithful payment of all freight, for the use or hire of the said ship, which shall or may become due and payable from the said H. C. Sempill, for any period beyond the said six months." The defendant at the foot of a copy of the written guaranty, prepared for Macqueen's signature, wrote and signed this undertaking: "I undertake to get a copy of the above guaranty duly signed by Thomas Potter Macqueen, Esq., M.P., and within a week delivered to Mr. Brittan" (the attorney for the plaintiffs). This settlement was made on the 6th of October, 1829; and in consequence of it, the plaintiffs suffered the *Warrior* to proceed to sea, and she sailed accordingly on the 10th of the same month. The guaranty was not executed by Macqueen, although the defendant was repeatedly applied to for that purpose; and in this action the plaintiffs claimed damages to the amount of upwards of 1500*l.*, being the amount unpaid by Sempill for the hire of the ship after the six months. A verdict was found for the plaintiffs, upon a case subject to the opinion of the court; and upon the argument the defendant's counsel insisted, among other things, that the memorandum at the foot of the letter, did not satisfy the statute of frauds, as it did not contain any expression of the consideration; and also

that as the proposed guaranty, to be signed by Macqueen, contained no expression of the consideration, the defendant was at most liable only for nominal damages, by reason of his failure to procure Macqueen to sign it.

§ 115. But on the point that the defendant's agreement was not sufficient within the statute, Tindal, C. J., delivering the opinion of the court, after reciting the facts, said: "Under these circumstances the contract appears to us not to be a contract to answer for the debt, default or miscarriage of any other person; but a new and immediate contract between the defendant and the plaintiffs. If Mr. Macqueen had signed the guaranty, that guaranty would indeed have been within the statute of frauds; for his is an express guaranty to be answerable for the freight due under the charter-party, if Sempill did not pay it. But no person could be answerable upon the promise to procure his signature, but the defendant. Sempill had never engaged to get the guaranty of Macqueen, nor had Macqueen engaged to give it. There was therefore no default of any one for which the defendant made himself liable; he did so simply upon his own immediate contract. For as to any default of Sempill in paying the freight, the action on the undertaking of the defendant, could not be dependent on that event; for it would have been maintainable, if the guaranty were not signed at any time after the day, on which the defendant engaged it should be given; that is, long before the time when the freight became payable." The learned Chief Justice next considered the question arising on the terms of the intended guaranty of Macqueen; as to which he said, that there was no consideration upon the face of it, either directly expressed, or to be supplied by fair and necessary inference. The inducement related entirely to past events; the entering into the charter-party; the payment of the six months freight by Sempill; and his intended departure in the ship. All this, he said, is "past and by gone consideration." So that if the guaranty had been executed, an action upon it would have necessarily failed,

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ent agreement, having no reference to the debt of Newell, except as to the measure of damages. The defendant was not to pay the debt of Newell; but was to give notice previously to making a settlement with him, which would enable the plaintiff to obtain payment of his demand. Whether Newell paid the debt or not, the promise of the defendant would remain to be performed.”(c)

§ 117. But a decided expression of opinion, against the doctrine that a promise can be taken out of the statute, because it had only indirectly the effect to render the promisor answerable for the debt of another, may be found in *Scott v. Thomas*, 1 Scammon (Illinois), 58, A. D. 1832. There the question arose upon demurrer to a plea of the statute, interposed as an answer to certain counts of the declaration, founded upon a promise to foreclose a mortgage, which the defendant held upon certain lands of the plaintiffs' debtor; to permit the plaintiff to buy in the property at a certain price, if it would not sell for more; and, after satisfying his own debts, to pay the surplus, if any, to the defendant. The Court, rendering judgment for the defendant upon the demurrer, said: “In the argument of this case, a distinction was attempted to be drawn between a promise to pay the debt of another, and a promise to do some collateral act by which such payment might be obtained. No such distinction, however, is recognized by any of the cases relied on, nor does any such exist. If the act promised to be done is, in its consequences, to operate as a discharge of the debt of another, the circuitry of the process by which that object is proposed to be effected, does not vary the principle of the case.”(d)

(c) It may be doubted whether the last sentence, which weakens the force of what goes before, contains a sound legal proposition.

(d) See also the cases in chapter vii, article ii, subdivision 2; and the following cases upon another branch of the statute: *Rice v. Peet*, 15 Johnson (New York), 503; *Goodrich v. Nickols*, 2 Root (Connecticut), 498. It must be conceded that the question is involved in considerable obscurity.

§ 118. It was also held by the English Court of Common Pleas, in *Anstey v. Marden*, 4 Bosanquet and Puller (1 New Reports), 124, A. D. 1804, that where the fulfilment of the promise will result, not in the discharge of the debt, but in its assignment to the promisor, it could not be said to be a promise to "answer for" the debt of another within the meaning of the statute. The defendant, in an action of assumpsit, to recover a debt of 1,000*l.*, pleaded specially to all of the cause of action except 525*l.*, in substance, that he, being indebted to the plaintiff and others, was unable to pay them in full; and they (the creditors) computed and agreed among themselves, that the defendant's estate would pay not more than ten shillings in the pound; whereupon it was proposed and agreed between such creditors and one Thomas Weston, by the defendant's procurement, "that the said Thomas Weston should and would pay, out of his own proper moneys, to the plaintiff and the said several other creditors of the defendant, a sum of money equivalent to 10*s.* in the pound on the amount of their respective debts, in full satisfaction and discharge thereof," which they would respectively accept in full satisfaction and discharge of the said debts; further averring that Weston had, out of his own moneys, but for and on account of the defendant, subsequently tendered to the plaintiff 525*l.*, being ten shillings on the pound of his demand, and that he had always been ready, etc. There was another special plea, in substance the same, except that the agreement was stated to have been made between the plaintiff, the defendant, and Weston.

§ 119. The defendant paid into court the 525*l.* At the trial, it was shown that an agreement was made between the plaintiff and three other creditors, to accept from Weston 10*s.* in the pound, "in satisfaction of the debts due to them from the defendant, and to assign those debts to the said T. Weston"; and that the others had signed a written agreement to that effect, and had been paid the amount of the composition by Weston; that the plaintiff at one time

authorized one of the others to sign for him, but after the others had signed, he refused to sign it, and withdrew the authority. It was contended, that the promise of Weston, being within the statute of frauds, formed no consideration for the plaintiff's promise; but, under the ruling of the Chief Justice, the defendant had a verdict; and, after argument of a rule nisi, the court refused a new trial. Sir James Mansfield, in the opinion delivered by him, said, that when he made his ruling at the trial, he did not see how one person could undertake for the debt of another, when the debt for which he was supposed to undertake was discharged by the very bargain; and he does not appear to have retracted that opinion. But he put his decision upon all the circumstances of the case; saying that the object of the transaction was to assign the debts to Weston; and, after dwelling upon the plaintiff's "extremely bad" conduct, he concluded by saying that, upon the whole, he thought this was a purchase of the plaintiff's demand, and for that reason a new trial ought not to be granted. Rooke, J., also said that it was a purchase of a debt. Chambre, J., said that it was a contract to purchase the debts; and that "it was of the substance of the agreement that the debts should remain in full force to be assigned to Weston;" and he had a right to use the names of the creditors to collect the full amount, so that "instead of being a contract to discharge Marden from his debts, it was a contract to keep them on foot;" but, as Weston wished to sustain the verdict, in the exercise of the discretionary power confided to them, the court ought not to set it aside. He added, that if the agreement was as represented by the pleas, he should have thought that the case was within the statute.

CHAPTER FIFTH.

GENERAL OBSERVATIONS UPON THE CASES DEPENDING UPON THE WORDS "DEBT, DEFAULT, OR MISCARRIAGES."

ARTICLE I.

Meaning and effect of these words, as used in this clause of the statute.

§ 120. We now enter upon the examination of the cases within the fourth class of the second general division, being those "where there was no original liability for a 'debt, default or miscarriage,' to which the undertaking of the promisor could be collateral." (a) They are very numerous and present many difficult questions, some of which are yet entirely unsettled, and several chapters will be required to complete the discussion. At the outset, we propose briefly to inquire what is the precise significance to be attached to the expression "debt, default or miscarriages."

§ 121. In *Castling v. Aubert*, 2 East, 325, A. D. 1802, a case which we shall have occasion to cite at length in a subsequent chapter, Lord Ellenborough apparently regarded the words "default" and "miscarriage" as synonymous, or nearly so. There the question arose upon the defendant's verbal promise, made in consideration of the surrender to him of certain policies of insurance issued in favor of one Grayson, to provide for the payment of certain bills drawn by Grayson upon the plaintiff, and accepted by the latter for Grayson's accommodation, as indemnity against which the plaintiff held the policies. At the time of the agreement one of the acceptances had matured, and an action had been commenced thereon against the plaintiff and Grayson; and this action was brought to

(a) Ante, § 70.

recover damages for the failure to provide for that acceptance. Lord Ellenborough, C. J., said: "I am clearly of opinion that this is neither an undertaking for the debt, default or miscarriage of another within the statute. It could not be for the *debt*, but rather for the *credit* of another; for when the promise was made, no debt was incurred from Grayson to the plaintiff; therefore, if at all within the statute, it must be for the default or miscarriage of another."

§ 122. The distinction suggested by his lordship between a debt and a default is undoubtedly correct, as the former word indicates a liability arising out of a contract, express or implied, to pay money to the promisee, whether the time for payment had then passed or was yet to come; whereas the latter word is more appropriate to designate a breach of some duty to the promisee, other than to pay money, whether it arose from an express contract, or from some liability created by law. Therefore "default" forms, in one aspect, a connecting link between "debt" and "miscarriages," of which one relates exclusively to contracts and the other peculiarly to torts, "default" being applicable with equal propriety to either; but, in another aspect, it serves to remove a doubt, which might have arisen, whether the statute was not confined to past transactions; inasmuch as "debt" and "miscarriages" are peculiarly applicable, and might have been construed to refer exclusively to such; (b) whereas "default" can mean nothing but the breach of a duty or the non-payment of a debt yet to be discharged. The sentence is therefore exceedingly comprehensive; and the three words, taken together, seem to include every act for which the third person might be subjected to an action, either at the time of the promise or subsequently. (c)

(b) In fact there was an effort made to exclude from this clause of the statute a promise to answer for a "debt" thereafter to be contracted, as we shall see in the next chapter.

(c) It will be seen upon an examination of the schedule prefixed to this volume, that in several of the acts in force in the United States, the legislatures have substituted "doings" or "misdoings" in place of "miscarriages."

§ 123. And yet considerable doubt was at one time expressed, whether the words of the statute included a promise to answer for a tort committed by another. This doubt appears to have arisen partly from the decision in *Read v. Nash*, 1 Wilson, 305, although there is nothing in that case to justify it, (d) and partly from some remarks of the court in *Buckmyr v. Darnall*, (e) as contained in the reports in 2 Lord Raymond, 1085, and 6 Modern, 248. There it is said, that one of the difficulties which the judges found, upon consultation, in holding the statute to be applicable to the defendant's promise, (which was that a third person should redeliver to the plaintiff, a horse hired to him by the plaintiff, at the defendant's request) grew out of the argument that, if the original bailee did not redeliver the horse to the plaintiff on demand, he would be liable only in trover or in detinue, founded upon a subsequent tort, and not upon any promise. And the decision was finally placed upon the ground, that the bailee was liable on the bailment, in detinue on the original delivery.

§ 124. But whatever doubts may have arisen upon any thing said in these cases, they were set at rest by the decision in *Kirkham v. Marter*, 2 Barnewall and Alderson, 613, A. D. 1819, where the language of the statute was subjected to a close criticism. There the question was, whether an action would lie on the defendant's verbal promise, to the effect that he would pay the plaintiff a certain sum in consideration of his not bringing an action against the defendant's son for wrongfully riding his horse to death. (f) Upon an application for a rule to set aside a nonsuit, counsel contended that the statute did not apply to a promise to be answerable for another's tortious act; but Abbott, C. J., said that this was a case clearly within the mischief intended to be remedied by the statute, and he thought the words of the statute were

(d) See the case abstracted in § 130.

(e) Section 143.

(f) The substance of the declaration is given, post, § 133.

sufficiently large to comprehend it. After quoting the words, he added: "Now the word 'miscarriage' has not the same meaning as the word 'debt' or 'default'; it seems to me to comprehend that species of wrongful act, for the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another, without his leave and license, and thereby causing his death, is clearly an act for which the party is responsible in damages, and, therefore, in my judgment, falls within the meaning of the word 'miscarriage.'" Holroyd, J., said: "I think the term 'miscarriage' is more properly applicable to a ground of action founded upon a tort, than to one founded upon a contract; for in the latter case the ground of action is that the party has not performed what he agreed to perform; not that he has misconducted himself in some matter, for which, by law, he is liable. And I think that both the words 'miscarriage' and 'default' apply to a promise to answer for another, with respect to the non-performance of a duty, though not founded upon a contract." Best, J., said that the case was within the spirit and principle, as well as the words, of the act; that there was nothing to restrain these words, 'default' or 'miscarriage'; and it appeared to him that each of them was large enough to comprehend this case.(g)

§ 125. Very similar to *Kirkham v. Marter*, is the recent American case of *Combs v. Harshaw*, 63 North Carolina, 198, A. D. 1869. There it appeared that, in 1864, the

(g) See also *Turner v. Hubbell*, 2 Day (Connecticut), 457. In *Smith v. Fah*, 15 B. Monroe (Kentucky), 443, A. D. 1854, the court held that a promise that a third person, in whose hands the plaintiff had placed a note for collection, should collect the same and pay over the amount to the plaintiff, was void, because not in writing; but the provision of the statute cited and commented upon is the one corresponding with the sixth section of Lord Tenterden's act. (See ante, page 44.) It is singular that the court should have put the decision upon the construction of that provision, for its application is quite doubtful, while the fourth section of the statute of frauds applies unmistakably.

defendant's son, who was under age, and a soldier in the confederate service, met the plaintiff, and forcibly took from him his horse. After the war was ended, the son, in consequence of this and other acts, left his father's house; and the defendant, upon the plaintiff demanding payment for the horse, promised "that if the former would allow his son to come home," he would refer the matter to some neighbors, who should say what ought to be done. The defendant afterwards refused to refer, and thereupon this action was brought; and the plaintiff had a verdict, the judge holding, at the trial, that the promise was not within the statute, because it was new, and supported by a sufficient consideration. The verdict was set aside upon appeal, the Supreme Court holding that the promise was within the statute, it having been simply superadded to the son's liability, without any release of the latter.

ARTICLE II.

The statute does not apply, unless the promisor and the third person became concurrently liable, for the same debt, default, or miscarriage.

§ 126. The general principle which governs all the cases depending upon the words "debt, default, or miscarriages," is, that in order to set the statute in motion, there must have been, at the time when the promise took effect, TWO CONCURRENT LIABILITIES. Indeed, this principle may be said to lie at the very foundation of every inquiry, whether a case is or is not within the provisions of the second clause of the fourth section; and, in that respect, the distinction between the class now under examination, and the other, classes, is that the latter are clearly within the condition of the principle; so that, if the promise can be saved from the operation of the statute, some rule must be invoked for that purpose, which applies to a case where there were two concurrent liabilities.

§ 127. It is quite evident that the principle requires that the liability, to which that of the promisor is supposed to be collateral, should be one which can be enforced by pro-

ceedings at law or in equity; and therefore, unless it appears that some person, other than the promisor, has incurred an actual liability with respect to the subject-matter of the promise, the agreement is not within the statute, although the third person may be under an imperfect, or merely moral obligation to respond. Thus, in *Downey v. Hinchman*, 25 Indiana, 453, decided A. D. 1865, the action was to recover upon a mutual agreement between the three plaintiffs, the defendant, and four other persons, (eight in all,) whereby the parties agreed to contribute equally towards the expense of procuring eight substitutes, to take the places of the minor son of the defendant and the seven parties to the agreement, other than the defendant; all of whom had been drafted into the service of the United States. The plaintiffs were appointed a committee to procure the substitutes, and this action was brought to recover one-eighth of the expenses incurred by them in so doing. The grounds of the defence were, that the agreement was without consideration, and that it was within the statute of frauds; both of which were overruled. Upon the latter point the court said: "To make the promise collateral, the party for whom the promise is made must be liable to the party to whom it is made." "In the case in judgment, Archibald Downey, the minor son of the defendant, was in no way liable to the plaintiffs. If the plaintiffs had procured a substitute for him without his request, there would have been no liability thereby created from him to them. The substitute was procured by the plaintiffs upon the promise and agreement of the defendant, and he alone is liable therefor."

§ 128. So in *Smith v. Mayo*, 83 Massachusetts (1 Allen), 160, A. D. 1861, the defendant had drawn an order on the plaintiffs for \$100 worth of lumber, to be delivered to one Savage, who was building an addition to the defendant's house, under a contract to furnish all the materials and do the work for a specified sum; by mistake the plaintiffs delivered to Savage \$160 worth, and charged it to the defendant. When they discovered their mistake they

presented their bill to the defendant, and he, with full knowledge of the facts, orally promised to pay it. It appeared, also, that the plaintiffs had stated that they regarded Savage as their debtor for the amount; and they had taken an order from him on the defendant for the balance of \$60, which they presented to the defendant for acceptance; but the latter had paid Savage in full. It was held that the promise was made upon sufficient consideration; and, also, that it was not within the statute, doubtless upon the principle now under examination, although the court assigned no specific reasons for its decision upon this point.

§ 129. And the two liabilities cannot be called *concurrent*, even if the third person was liable for some debt or duty, unless it was the same debt or duty which the promisor undertook to discharge. This proposition, which is, in theory, very obvious and easy of application, has nevertheless sometimes led to considerable perplexity. There are a few cases, where the promise grew out of a claim of precedent liability against the third person, and the practical effect of its fulfilment would be to relieve the latter, wholly or in part, from that claim; and yet, it was held, that the promise was without the statute; either because the third person's discharge was not expressly stipulated for; or because it did not appear, either from affirmative proof, or from any admission contained in or implied by the contract between the parties, that the claim of liability against him could have been enforced by an action. These cases have led to considerable discussion, which has not yet relieved some of them from obscurity; and we will proceed to examine them in this place; for we regard them as properly depending upon the general principle just stated, notwithstanding the expression of a contrary opinion from several sources entitled to great respect.

§ 130. The most important of those cases, and one of the most celebrated of the early decisions under the statute, is

Read v. Nash, 1 Wilson, 305, decided in the King's Bench in the year 1751. (a) There the plaintiff sued as executor of one Tuack, who, the report says, had "brought an action of assault and battery against one Johnson. The cause being at issue, the record entered, and just coming on to be tried, the defendant Nash, being then present in court, in consideration that Tuack would not proceed to trial, but would withdraw his record, undertook and promised to pay Tuack 50*l.*, and the costs in that suit, to be taxed till the time of withdrawing the record; in which taxation all such sums of money were to be allowed as Tuack had paid, and was liable to pay, to his attorney and witnesses who attended the trial. Tuack, relying upon this promise, did withdraw the record, and no further proceeding was had in that cause." Tuack being dead, his executor brought this action upon the special promise by Nash; and the defendant pleaded non assumpsit, and specially "that there was never any agreement in writing touching this promise, or any memorandum thereof." To the special plea the plaintiff demurred, and the defendant joined in demurrer. The cause was twice argued, and as the opinion of the court is short, it shall be given in full. Lee, C. J.: "The single question is, whether this promise, which is confessed by the demurrer not to have

(a) The precise state of facts which was presented to the court in *Read v. Nash* was suggested, and the rule with respect thereto stated obiter, by Lord Chief Justice Holt, in *Stevens v. Squire, Comberbach*, 362, A. D. 1696. (S. C., 5 Modern, 205.) The case is a direct authority only upon the question whether, where the promise admits that the promisor was liable in another action, independently of the promise, the fact that another person was also alleged to be liable in the same action, brings the promise within the statute; but the Chief Justice having stated that such a promise was original, counsel for the defendant asked him whether it would not have been within the statute, if the defendant had not been a party to the original action. Holt replied: "Put that case when it comes; but if A saith *do not go on against B, etc.*, this being to be performed within a year, it will bind him; 'tis like the case of buying goods for another man, which is every day's practice. But if A saith, do not go on against B, and I'll give you ten pounds *in full satisfaction of that action*, that might be within the statute; but here he appears to be a party concerned in the former action."

been in writing, is within the statute of frauds and perjuries; that is to say, whether it be a promise for the debt, default or miscarriage of another person? And we are all of opinion that it is not, but that it is an original promise, sufficient to found an assumpsit upon against Nash, and is a lien upon Nash, and upon him only. Johnson was not a debtor; the cause was not tried; he did not appear to be guilty of any default or miscarriage: there might have been a verdict for him if the cause had been tried, for any thing we can tell; *he never was liable to the particular debt*, damages or costs. The true difference is between an original promise and a collateral promise; the first is out of the statute; the latter is not, when it is to pay a debt of another which was already contracted. Judgment for the plaintiff."

§ 131. It is very clear from this opinion, that the cause was decided upon the solitary ground that, with respect to the particular moneys which the defendant undertook to pay, the third person, who was benefited by the promise, did not incur at the time it was made, and had not previously incurred, any liability whatever; and therefore the only purpose to which the case can be legitimately put, is to determine how close may be the connection between a claim of precedent liability and a new promise, without bringing the latter within the statute. The promise was in two parts, namely, to pay the 50*l.* and to pay the costs. The court must have thought it a valid promise as to both parts, otherwise the demurrer would have been sustained. (b) With respect to the promise to pay the 50*l.* there is but little difficulty, as the plaintiff would have been under no obligation to credit that sum upon his claim for damages, or upon any verdict or judgment which he might have recovered against Johnson; hence, as to that part of it, the promise was entirely unconnected with Johnson's liability. But the engagement to pay the costs, eo nomine, was assuming a liability which would have

(b) See *Chater v. Beckett*, 7 Term Reports, 201, A. D. 1797.

rested upon Johnson, if he had been defeated in the action ; and consequently the payment of that amount of money would have relieved him so much. It seems, therefore, incorrect to say that the cause was decided, as has been supposed by an eminent writer, on the ground that Johnson's liability would continue the same after the performance of the promise as before. But probably it was rightly held that the promise respecting the costs was not an undertaking for the debt of Johnson ; because, at the time of the promise, he was liable for them only in a future contingency, of uncertain occurrence. The principle is analogous to that whereby if the third person was not liable, when a verbal promise was made, it cannot be affected by a liability subsequently accruing.(c)

(c) See post, § 152. There was, however, one feature in the case which appears to have been entirely overlooked by the court and counsel : namely, that although no part of the promise might have been an engagement to answer for the debt or default of *Johnson*, that part of it relating to the costs was a promise to answer for the debt of *Track* to his attorney. In these days such an objection would not be sustained, because the promise was not made to the creditor (chapter xi) ; but, as will be shown in the proper place, no such distinction was recognized till many years after *Read v. Nash* was decided. And, if that objection had been taken, probably the decision would have been otherwise, and much subsequent perplexity would have been avoided thereby. Perhaps it would be no exaggeration to say, that *Read v. Nash* was discussed in half of the cases which arose under the second clause of the fourth section of the statute of frauds, for three quarters of a century after the decision was made. But we call to mind but six, where any promise was taken out of the statute upon its authority : namely, *Bray v. Freeman*, 2 Moore, 114 ; *Harris v. Hunthach*, 1 Burrow, 371 ; *Edwards v. Kelley*, 6 Maule and Selwyn, 204 ; *Bird v. Gammon*, 3 Bingham's New Cases, 883, in each of which it controlled the opinion of one judge ; *Tomlinson v. Gill*, *Ambler*, 330, where, if the decision was correct on this question, the reason assigned was probably erroneous ; and *Chapin v. Merrill*, 4 Wendell, 657, where it was referred to with *Tomlinson v. Gill*. All these cases are abstracted elsewhere in this volume, and in each of them the application of *Read v. Nash* was very remote. If we were governed entirely by our own views of the practical importance of *Read v. Nash*, it would not occupy as large a portion of our space as we have felt bound to assign to it ; but, although the fashion, which prevailed so long and so universally, of citing it, for the purpose of distinguishing it from the particular

§ 132. The Court of Common Pleas took an early occasion to limit the effect of the ruling in *Read v. Nash*, by its decision in *Fish v. Hutchinson*, 2 Wilson, 94, A. D. 1759. There, according to the report, the plaintiff declared "that, whereas one Vickars was indebted to him in a certain sum of money, and he had commenced an action for the same; the defendant, in consideration that the plaintiff would stay his action against Vickars, promised to pay plaintiff the money owing him by Vickars." Probably the declaration stated the promise to have been verbal, for otherwise the court must have presumed it to have been in writing. There was a demurrer and joinder in demurrer; and the question whether the statute applied was alone argued. The plaintiff's counsel contended that,

case under discussion, is now growing obsolete, it fills, nevertheless, too conspicuous a position in the text books and the reports, to justify us in passing it over without careful attention; and besides, an explanation of the case may be necessary to avoid misapprehensions of its effect. The authorities are quite at variance as to the principles which it establishes. In the note to *Forth v. Stanton*, in the sixth edition of Williams's *Saunders*, vol. 1, p. 211, *b*, the opinion is expressed that *Read v. Nash* is overruled by *Kirkham v. Marter*, 2 Barnewall and Alderson, 613, on the ground that, in *Kirkham v. Marter*, it did not appear that the son was liable for the death of the horse, except by the admission of the defendant, contained in his request to the plaintiff to forbear to sue; while in *Read v. Nash*, the admission that the third person was liable, contained in the request to the plaintiff not to continue the suit, was equally strong. And in *Chitty on Contracts*, eighth edition, p. 478, the same opinion is expressed. But in *Kirkham v. Marter*, the declaration alleged that the third person had, in fact, committed the tort; and the agreement upon which the action was brought was, that the plaintiff should accept the amount undertaken for in satisfaction of his claim; the distinction between the two cases being precisely the one suggested by Holt, C. J., in *Stevens v. Squire*. And it is very clear that, in *Kirkham v. Marter*, the court did not suppose that they were overruling *Read v. Nash*. The latter case was followed in those already mentioned, and it continues to be cited as authority to the present day. Professor Parsons, in his *Treatise on Contracts*, vol. 3, fifth edition, p. 23, and note, says, that the true rule established by that case and *Stevens v. Squire* is, that, if the liability of the third person will continue, notwithstanding the performance of the promise, the agreement is not within the statute, a conclusion which is commented upon in the text. Mr. Roberts, in his *Treatise*

under the decision of *Read v. Nash*, the promise was not within the statute. "But per totam curiam: This case at bar is very clearly within the statute, for here is a debt of another person still subsisting, and a promise to pay it: and it is not like the case of *Read v. Nash*, for that was," etc., (giving a statement of the facts). "So in that case there was no debt of another, it being an action of battery; and it could not be known, before trial, whether the plaintiff would recover any damages or not; but, in the present case, here is a debt of another still subsisting and a promise to pay it. Judgment for the defendant."

§ 133. And in *Kirkham v. Marter*, 2 Barnewall and Alderson, 613, A. D. 1819, which was cited a few pages

on the Statute of Frauds, p. 233, classes it with *Tomlinson v. Gill*, Ambler, 330, and some other cases, as establishing the rule, that, if the consideration of the promise takes its root in a transaction distinct from the original liability, the case is not within the statute, a doctrine which, in the broad terms stated by him, was long ago exploded. (See post, chapters xvi and xvii.) In *Browne on the Statute of Frauds*, § 157, it is said, that the case proves that the statute does not apply where it does not appear in point of fact that any debt or liability has been incurred; which is substantially the same view taken of it in the text. Mr. Fell, in his *Treatise on Guaranty and Suretyship*, p. 10, also cites the case as showing that the debt of the third person must be subsisting, and not a mere demand for which the party may or may not be liable. Among the numerous reported comments of judges and counsel upon the case, we find distinguished counsel saying, in the course of the argument of *Turner v. Hubbell*, 2 Day (Connecticut), 457, "In England, a withdrawal of the record is a bar to another action. It might hence seem as if the 50*l.* was paid as damages." If such was, in truth, the effect of withdrawing the record, the promise would be now sustained on the ground that the defendant in the original action was discharged in consideration of its being made (chapter ix); a principle which was not generally recognized even as late as 1807, when that case was argued. But we have searched the English books of practice in vain for any such rule. Under the old common law practice in New York, a withdrawal of the nisi prius record had no other effect than to put the cause over the term. Such, we doubt not, was also the rule in England. Still, it is to be noted that Sir Fletcher Norton, commenting upon the case, in the course of his argument in *Williams v. Leper*, 3 Burrow, 1886, speaks of it as if Johnson had been discharged.

back, the ruling of the last case was applied to a promise, founded upon forbearance to prosecute an action, to recover damages for a tort. There the declaration stated that the son of the defendant had, without the plaintiff's leave, wrongfully ridden the plaintiff's horse, in consequence whereof the horse died; that the plaintiff had threatened to commence an action against the son therefor, and, in consideration that he would not do so, "and that the plaintiff would be content to take, for and on account of the said horse," certain sums; to be ascertained as therein particularly mentioned, the defendant agreed to pay those sums; and they having been so ascertained, this action was brought upon that promise to recover the amount thereof. At the trial, the plaintiff proved a verbal promise as laid in his declaration, and was nonsuited. Upon a motion for a rule for a new trial, it was argued that the statute did not apply to cases of tort; and that as the son owed no debt to the plaintiff, a verbal promise was good, under the decision in *Read v. Nash*; but after overruling the first proposition, Abbott, C. J., said: "The case of *Read v. Nash* is very distinguishable from this; the promise there was to pay a sum of money as an inducement to withdraw a record, in an action of assault brought against a third person. It did not appear that the defendant in that action, had ever committed the assault, or that he had ever been liable in damages; and the case was expressly decided on the ground that it was an original and not a collateral promise. Here the son had rendered himself liable by his wrongful act, and the promise was expressly made in consideration of the plaintiff's forbearing to sue the son. I think therefore the nonsuit is right."

§ 134. The two latter cases confine the ruling in *Read v. Nash* within narrow and tolerably well defined limits. They hold, that whenever the promisor undertakes to respond for any debt or damages, for which it is conceded that the third person is also liable, the promise is within the statute; though it may be for the payment of a definite

CHAPTER FOURTH.

CASES DEPENDING UPON THE WORDS "ANY SPECIAL PROMISE TO ANSWER."

§ 94. The cases included within the first three classes of the second general division, being those where it has been held that the statute does not prevent a recovery upon oral evidence, because the circumstances do not satisfy some one of the first five words of the phrase under examination, are comparatively few in number; so that they may all be conveniently considered together in one chapter, and governed by one rule, namely:

RULE SECOND.

The statute does not apply to implied promises; or to liabilities for deceitful representations, whereby the third person gained credit; or to promises to do some act for the security of a creditor of a third person, other than the absolute or contingent assumption of the debt by the promisor.

ARTICLE I.

Where the promise was not "special."

§ 95. The term "special promise," has a well recognized meaning in the law: it is synonymous with express promise, and denotes a promise which has been, in fact and in express terms, made by the promisor, as contradistinguished from an implied promise. Implied promises arise, without the actual assent of the promisor, by operation of law, being "such as reason and justice dictate, and which, therefore, the law presumes that every man has contracted to perform, and upon this presumption makes him answerable to such persons as suffer by his non-performance." (a) The object of inserting the qualifying adjective in the statute, seems to have been to leave implied promises

(a) 3 Blackstone's Commentaries, 158.

unaffected by its provisions.(b) However, one learned judge has adopted the scholastic, rather than the legal definition of the expression, for he says: "The word 'special,' according to Walker, means 'denoting a sort, or species, particular, peculiar, appropriate, designed for a particular purpose.' The statute was designed to avoid only such promises as are especially and particularly to answer for the debts of others, not those which, while incidentally assuming the responsibility for such debts, are wholly or principally for the purpose of performing some distinct obligation of the promisor." (c) But, although the conclusion to which the learned judge was led by his definition is unobjectionable, the profession are generally agreed that the expression "special promise" is used in the statute merely in contradistinction to an implied promise; and upon that understanding some distinctions have been made, which in their day were, and in some cases may yet be important, though, in most of the particular instances presently cited, the action would be now sustained upon other principles.

§ 96. The point was thus adjudged in one of the earliest reported American cases, *Smith v. Bradley*, 1 Root (Connecticut), 150, decided by the Superior Court in the year 1790, as follows: "Action of the case declaring—That on the 29th of April, 1781, the defendant received of the plaintiff a pay-table order for 200*l.* in state bills, which he received of Col. Champion, and was accountable to him for; that the defendant, in consideration thereof, promised to account to Col. Champion for it; that he hath

(b) *Furbish v. Goodnow*, 98 Massachusetts, 296. In *Elder v. Warfield*, 7 Harris and Johnson, 391, Buchanan, C. J., said, that where the question arose in the case of goods, etc., furnished to the third person, the promise is within the statute, if the action cannot be sustained upon the common counts, but the plaintiff must declare specially upon the promise; and this appears to have been the view of Serjeant Williams, according to the original note to the case of *Forth v. Stanton*, 1 Saunders, 210.

(c) Per Strong, J., in *Durham v. Manrow*, 2 New York (2 Comstock), 538.

never accounted to said Champion for it; but the plaintiff hath been compelled to pay said Champion for said order; damage 183*l*. Issue to the jury on the plea of non-assumpsit, and verdict for plaintiff. Defendant moves in arrest the insufficiency of the declaration, being upon a parol promise made in A. D. 1781, more than three years before the date of the plaintiff's writ. And, by the statute against frauds and perjuries said action is not maintainable. Judgment—That the motion in arrest is insufficient. By the Court.—It is no cause of arrest that the jury have found their verdict upon insufficient evidence, for they are judges of the weight of evidence. The consideration of the promise is laid to have been in April, A. D. 1781; but the promise did not arise until the plaintiff was compelled to pay Col. Champion said order, and it was a promise or obligation which the law raised from the natural equity of the transaction, and not within said statute."

§ 97. So in *Goodwin v. Gilbert*, 9 Massachusetts, 510, A. D. 1813, the plaintiffs had assigned and conveyed to the defendants, by deed-poll, certain indentures and interests in real estate, by the terms of which the plaintiffs were to pay certain sums of money to a third person, the deed specifying that it was subject to all the conditions, etc., mentioned in the conveyances to the plaintiffs; and the defendants had taken possession of the premises. An action of assumpsit was brought to charge the defendants with the payment of the moneys; and, on a verdict taken for the defendants, subject to the opinion of the court, it was insisted in their behalf, that the promise was within the statute of frauds. But the Court, after saying that when the grantee enters under a deed-poll, certain duties being reserved to be performed, although no action lies upon the deed, the grantor may maintain assumpsit for the non-performance of the duties reserved, added: "It was objected that this was an agreement concerning an interest in lands; and that no memorandum being signed by the party, the case was within the statute of frauds. But where the law raises the promise, it is not within the stat-

ute. The same answer may be made to the objection that it was a promise to pay the debt of another, and not in writing." So the verdict was set aside, and a verdict entered for the plaintiffs.

§ 98. A similar decision was made in *Pike v. Brown*, 61 Massachusetts (7 Cushing), 133, A. D. 1851. There it was held that where a deed describes the land conveyed, as being subject to a mortgage previously executed by the grantor, and expresses that the amount due upon the mortgage is part of the consideration, and that the deed is on condition that the grantee shall assume and pay the debt secured by the mortgage; an action of assumpsit can be maintained by the grantor who has been compelled to pay the mortgage debt; the objection that the promise of the grantee was within this clause of the statute, not being tenable because it was made to the debtor himself. "Besides," the Court added, "promises implied by law are not within the statute."

§ 99. And it would seem, although the question arose under a kindred statute,^(d) that the decision in *The Cabot Bank v. Morton*, 70 Massachusetts (4 Gray), 156, A. D. 1855, turned in part upon the same point, the court holding there that the warranty of genuineness of the signature of the indorser of a promissory note, which arose in favor of the bank, against a person who offered the note for discount was an implied promise, and therefore not within a statutory provision, requiring certain representations and assurances respecting third persons, to be in writing.

§ 100. So in *Allen v. Pryor*, 3 A. K. Marshall (Kentucky), 305, A. D. 1821, it appeared that the plaintiffs had sold goods to the firm of Gill and Bainbridge, and by the terms of sale the purchase-price was to be secured by an indorsed note, which they were to furnish; and that they had made a note, payable to the defendant, which he "assigned" to

(d) The Massachusetts statute referred to, post, § 105, note.

the plaintiff in payment of the purchase-price; and the question was whether this "assignment" created a liability. The majority of the court, affirming a judgment for the plaintiff, held that the law would imply from the assignment a promise that the assignor would pay the amount of the note, if it could not be collected from the makers; and that inasmuch as this liability of the defendant "does not arise from any express promise of his, but it results from a promise which the law implies, from the fact of his having assigned the note on a sufficient consideration, the statute of frauds never has, and we suppose never ought to be construed to apply to such a promise." (e)

§ 101. And in *Stocking v. Sage*, 1 Connecticut, 519, A. D. 1816, the defendants were owners of a vessel, of which the plaintiff was the master; and while in a foreign port, the plaintiff contracted with K. & Co. to go to another place, and there purchase and transport certain cattle for them, upon which contract he received an advance from them; and on the return voyage he was compelled to put into another port, where he sold the cattle to pay freight and charges, and returned to his home port. When he had arrived there, the plaintiff claimed the right to retain the proceeds of the cattle, until he could settle with K. & Co.; but the defendants insisting that they were entitled to the money, he paid it to them on their verbal promise to indemnify him against any liability to K. & Co., including costs and expenses; and they having sued the plaintiff at the foreign port, he was put to large expenses in defending the suit, in which he was finally

(e) In some of the United States, the mere assignment of an evidence of debt is construed as implying a guaranty of payment or collection, under conditions more or less restricted. Other instances of this rule will appear hereafter. In the particular case, it would appear, from the statement of facts, that the defendant actually indorsed his name upon the note, but, as it was not negotiable, the court treated the transaction as a mere assignment. Throughout the whole case, the words "assignment" and "indorsement" are used as convertible terms.

successful; and now brought this action for reimbursement, and recovered in the court below. The judgment was affirmed upon a writ of error, the prevailing opinion holding, with respect to the question arising under the statute of frauds, that the law would imply an agreement on the part of the principal, to reimburse the agent, in such a case as this, and that "such implied agreement is not within the statute of frauds and perjuries." (f)

ARTICLE II

Where a liability for a third person's debt or default arises out of a deceitful representation and not out of a "promise."

§ 102. The statute, being confined in terms to *promises*, has no application to an action sounding in tort, and founded upon a deceit practised upon the plaintiff, by a false and fraudulent representation, made by the defendant, concerning the character or pecuniary circumstances of another, whereby the plaintiff was induced to give him credit. As the result of a recovery, in such an action, will always practically charge the defendant with the debt of another, or with damages for his default or miscarriage, a

(f) Another instance of an implied promise, which is not within the statute, is that of an assignee for the benefit of creditors. *Drakeley v. Deforest*, 3 Connecticut, 272; *Hitchcock v. Lukens*, 8 Porter (Ala.), 333; *Hughes v. Stringfellow*, 15 Alabama, 324. Perhaps, also, some of the questions, to be considered in the next volume respecting the effect of performance of a special promise which is within the statute, may in part depend upon the same principle. Thus in *Gray v. Hill, Ryan and Moody*, 420, A. D. 1826, the plaintiff declared specially upon an agreement to assign to him a lease of certain premises, in consideration of his putting them in repair, averring that he did repair them, etc., and there were also counts for work and labor and money expended. At the trial, it appeared that the promise was verbal, and it was objected that the plaintiff could not recover under the statute of frauds; but Best, C. J., said, that although the fourth section of the statute was decisive against the plaintiff upon the special count, he might recover upon the others; that the law would "imply a promise, not touched by the statute, nor within the danger of perjury guarded against by it." In *Kelsey v. Hibbs*, 13 Ohio, N. S. 340, cited in a subsequent chapter, the court appear to have overlooked the statutory requirement that the promise must be special.

grave question arose, coeval with what is generally regarded as the establishment of the principle, that an action could be maintained for a false recommendation, whether the statute of frauds did not require, if not in terms, at least by necessary implication, that the recommendation should be proved by some writing. The first adjudged case in which this species of action was sustained is *Pasley v. Freeman*, 3 Term Reports, 51, decided in 1789, where each of the judges delivered opinions seriatim and at great length. There is no allusion in the prevailing opinions to the statute of frauds; but Grose, J., founded one of his arguments against sustaining the action, upon this provision of the statute.

§ 103. But in *Eyre v. Dunsford*, 1 East, 318, A. D. 1801, the point that the statute did not apply was distinctly determined. This was an action for falsely and fraudulently representing one Thompson, to be a person whom the plaintiffs might safely trust, in consequence of which they sold him goods upon credit; and the plaintiffs having had a verdict, a rule nisi was obtained for a new trial, and was supported in part on the ground, that the action was calculated to trench upon the statute of frauds. But the rule was discharged; and Lord Kenyon, in his opinion, held that the statute has no relation to such cases. "It raises," he said, "certain legal presumptions of fraud, from the want of certain formalities in contracts and other transactions, against which it guards by avoiding them; but that has no application to actions founded on actual fraud and deceit, in order to recover damages by the party grieved."

§ 104. The question came again before Lord Kenyon and the other justices of the King's Bench at a subsequent term in the same year, (1801,) in the case of *Haycraft v. Creasy*, 2 East, 92. There the defendant was clearly the dupe of a female adventurer named Robertson, who had induced him not only to lend her his acceptances to the amount of 2,000*l.*, but to recommend her to the plaintiff as worthy

of credit; and the only ground upon which the action could be maintained, with any plausibility, was, that in answer to inquiries whether he had any knowledge of her affairs, except from hearsay, he had said that he knew of his own knowledge that she was a lady of rank and fortune, whom the plaintiff might safely trust; whereas in fact he had known her as a poor school mistress, and relied entirely upon her own statements, respecting her sudden accession to wealth. The plaintiff having recovered a verdict, a rule nisi to set it aside was argued on each side by four of the most distinguished counsel at the English bar, among them, Sir Edward Law, afterwards Lord Ellenborough, for the defendant; who argued that if a particular phrase would render a man liable for the debt of another, it militated as much against the spirit of the statute, as if words of direct guaranty were used; and all the mischief would be let in which the statute was made to prevent, if a verbal representation could be made the foundation of such an action.(a) But Lord Kenyon repeated what he had said upon this point in *Eyre v. Dunsford*; and although he was in the minority in this particular case, the other judges holding, against his opinion, that the action could not be maintained, the decision was put upon the ground that there was no mala fides in the defendant, his assertion being evidently intended only as a very strong expression of his confidence in the woman; and it is now well settled that the statute does not apply to such cases.(b)

(a) According to the report in East, the counsel for the defendant insisted that no action of this character should be sustained. But Lord Campbell, in the third volume of his Lives of the Chief Justices (page 87 of the American edition), states the argument of Law to have been, that to make the defendant liable without actual deceit, would be to treat him as a surety for Miss Robertson, without any written guaranty. Lord Campbell adds that the mortification which Lord Kenyon suffered at being overruled in this case by the puisnes, was supposed to have hastened his death.

(b) See the cases cited, post, §§ 106, 107, 110, 111, and also *Adams v. Anderson*, 4 Harris and Johnson (Maryland), 558; *Upton v. Vail*, 6 Johnson (New York), 181; *Ewins v. Calhoun*, 7 Vermont, 79.

§ 105. There has been a great difference of opinion among the English judges, upon the question whether this ruling stands upon a solid foundation of reason and expediency; and some of them have expressed a very decided opinion, in favor of the interference of the legislature, to require that no such representations shall be actionable, unless they were made in writing; (c) which opinion in the course of time prevailed. In the year 1828 was enacted by parliament the statute, 9 George IV, chapter 14, commonly called Lord Tenterden's act, designed to bring this class of cases, as well as others, to which it was thought that the same rule might be properly applied, within the principle of the statute of frauds; by providing that a memorandum in writing should be necessary, in order to maintain an action for deceitful representations respecting the ability or character of a third person; or upon a promise to pay a debt contracted during infancy; or a debt barred by the statute of limitations. And similar statutes have been enacted in some of the United States. (d)

(c) Per Lord Alvanley, C. J., and Chambre, J., in *Tapp v. Lee*, 3 Bosanquet and Puller, 367, post, § 106. Per Lord Eldon, Chancellor, in *Evans v. Bicknell*, 6 Vesey, 172, on page 186, and in *Ex parte Carr*, 3 Vesey and Beames, 108.

(d) Alabama, Indiana, Kentucky, Maine, Massachusetts, Michigan, Missouri, Oregon, Vermont, and Virginia. For these statutes, and section six of Lord Tenterden's act, see the schedule prefixed to this volume. It is foreign to the purpose of this work, to enter into any detailed examination of the provisions of these statutes, or of the cases under them, as they have nothing in common with that part of the statute of frauds, which forms the subject of our examination, except that they require a memorandum in writing. Still they are sometimes spoken of as provisions of the statute of frauds; and they are generally contained in the same chapter as the sections of the statute of which this work treats. The following cases have been decided, upon those parts of the statutes in question, which refer to false and fraudulent representations, viz.: In England, *Lyde v. Barnard*, *Tyrwhitt and Granger*, 250; *Haslock v. Ferguson*, 7 Adolphus and Ellis, 86; *Swann v. Phillips*, 8 Adolphus and Ellis, 457; *Turnley v. McGregor*, 6 Scott, N. R. 906, 1 Dowling and Lowndes, 506, and 6 Manning and Granger, 46; *Wade v. Tatton*, 18 Common Bench, 371, 2 Jurist, N. S., 491, and 25 Law Journal, O. P., 240; *Sheen v. Bumpstead*,

§ 106. But before the passage of the act in question, the courts had been required to exercise no little vigilance, to prevent the happening of the result, which was predicted by the opponents of the rule established in *Pasley v. Freeman*, to wit, that it would lead to an evasion of the statute of frauds, by suing on verbal guaranties, under the pretence of bringing actions for deceit. Such an action, or at least one which was very strongly open to the suspicion of being such an action, was brought in the Common Pleas, almost in the infancy of the doctrine, and was decided in 1803. It is reported under the title of *Tapp and another v. Lee*, 3 Bosanquet and Puller, 367. The declaration counted upon a fraudulent representation, concerning the character and credit of one Brunel; and it appeared upon the trial that Brunel, having purchased goods from the plaintiffs on credit, on three previous occasions, to the amount of 28*l.*, applied for more goods to the amount of 28*l.* 4*s.* 9*d.*; and the plaintiffs, being unwilling to trust him further, without an inquiry into his character and circumstances, sent their servant to make inquiries from the defendant, who thereupon made the representations complained of; and upon the servant's report, the plaintiffs gave Brunel credit for the goods. Soon afterwards, the defendant inquired from the servant if the plaintiffs had trusted Brunel; and on being answered that he had been trusted, in consequence of what the defendant had said, replied, "I did not think you was such a cake." It was further shown, that the defendant himself had refused to trust Brunel, who was an uncertifi-

8 Jurist, N. S., 702, 10 Weekly Reporter, 740, 2 Hurlstone and Coltman, 193, 10 Jurist, N. S., 242, 32 Law Journal, Exch., 271, 11 Weekly Reporter, 734, and 8 Law Times, N. S., 832. In the United States, *Warren v. Barker*, 2 Duvall (Kentucky), 155; *Jasigi v. Brown*, 17 Howard (U. S.), 183; *Hearn v. Waterhouse*, 39 Maine, 96; *Cabot Bank v. Morton*, 70 Massachusetts (4 Gray), 156; *Norton v. Huxley*, 79 Mass. (13 Gray), 285; *Kimball v. Comstock*, 80 Mass. (14 Gray), 508; *Wells v. Prince*, 81 Mass. (15 Gray), 562; *Mann v. Blanchard*, 84 Mass. (2 Allen), 386; *McKinney v. Whiting*, 90 Mass. (8 Allen), 207; *Huntington v. Wellington*, 12 Michigan, 10; *Crown v. Brown*, 30 Vermont, 707.

cated bankrupt, as the defendant knew. The jury found a verdict for the plaintiffs, and a rule nisi to set it aside having been obtained and argued, all the judges delivered opinions. Lord Alvanley, C. J., before whom the cause had been tried, after expressing a wish that the legislature would provide that in such cases the representations must be in writing, which, he said, it was clearly settled by the previous cases, was not necessary; remarked, that at the trial he had pointed out the circumstances, from which it appeared probable that the inquiry made by the plaintiffs was intended as a trap; but the jury had passed upon the question, and it could not be called a verdict against evidence; still he was not satisfied with it, and thought that the defendant ought to have a new trial on payment of costs. And with him all the judges agreed, Rooke, J., and Chambre, J., saying, that there was reason to believe that the plaintiffs intended to practice a trick upon the defendant, and that he ought to be allowed to take the opinion of another jury upon terms; and the rule was accordingly made absolute upon payment of costs. Undoubtedly the circumstance which made the most impression upon the minds of the judges was, that the plaintiffs had previously given Brunel credit; and in fact it is to be inferred from the report, that the former debt was unpaid, at the time when the purchase in question was made.

§ 107. The next case was *Hamar v. Alexander*, 5 Bosanquet and Puller, 241, decided A. D. 1806, also in the Common Pleas. It presented the feature that the fraudulent representation was coupled with a verbal guaranty of payment of the debt, which the plaintiff was permitted to separate from the guaranty so as to recover upon the representation alone. The declaration stated that the defendant falsely, fraudulently, and deceitfully represented to the plaintiff "that one Leo was a good man, and might be trusted for any amount;" averring that he knew it to be false, and that on the faith of the representation the plaintiff had sold Leo goods. At the trial the

plaintiff proved the representations as laid in the declaration; and that the defendant added, "that if Leo did not pay for the goods he would." It was also proved that the defendant knew that Leo was in bad circumstances, and that he procured the credit for him, in order that the goods might be consigned to a house with which the defendant was connected; and one Crompton was also concerned in the purchase, as a broker. On the part of the defendant it was objected, that the representations having been accompanied by a promise to pay, which was void under the statute of frauds, the action could not be sustained for the deceit; because the injury might have arisen from the void promise, and not from the false representations. But the plaintiff had a verdict, and the defendant obtained a rule nisi for a nonsuit on that ground. Sir James Mansfield, C. J., delivered the opinion of the court, in which he said, that, although it was true that it was impossible to determine how much mischief was done by the representations, and how much by the void promise, he was nevertheless of the opinion that, upon the whole, the verdict ought to stand. "Independent of the promise," he said, "I think this is clearly a case, upon which an action might be maintained, if the case of *Pasley v. Freeman* had never been heard of. Here a gross cheat was meditated, and I am by no means certain that the parties might not have been indicted for a conspiracy." Then, after dwelling further upon the fraudulent character of the conduct of all the parties to the cheat, he added: "The only question then is, whether the addition of this promise, that if Leo did not pay, the defendant would, will prevent the plaintiff from having a right to support this action. I think that it will not. There is no proof that the plaintiff ever considered the defendant as his debtor, or ever called on him for the money, or relied on his promise in the least degree. In the next place, we must suppose every man to know the law; and if the plaintiff was acquainted with the law, he must have known that the defendant's promise was worth nothing, and could have given no credit to him upon it. He cannot have con-

sidered it in any other light than as a mode of expression by which the defendant intended more strongly to express his opinion of Leo's circumstances. There being, therefore, no objection on the ground of this promise being added to the other circumstances, we are of opinion that the verdict is right."

§ 108. It would seem from the remarks of the Chief Justice, that the test of the right to recover in such a case, is whether the plaintiff relied upon the guaranty, or upon the representation alone. Much stress was laid upon the circumstance that this particular verbal guaranty was void as matter of law, being conditional by its terms;(e) but, upon the whole, it is fairly to be inferred from the opinion, that in all cases of this character the guaranty may be separated from the representation, and the question left to the consideration of the jury, whether the plaintiff relied upon the guaranty, or upon the representation, even in a case where the statute did not render the former void. But in *Gallager v. Brunel*, 6 Cowen, 346, and in *Shaw v. Stine*, 8 Bosworth, 157,(f) the New York courts have held that even if the plaintiff relied upon the guaranty, he is entitled to maintain the action, if he relied also upon the false representations.

§ 109. The next case, which arose in the King's Bench, was *Smith v. Harris*, 2 Starkie, 47, tried at nisi prius in 1817, before Lord Ellenborough. As this case has apparently been misunderstood by some commentators, we transcribe the language of the report, omitting only some matter irrelevant to this inquiry. "This was an action on the case against the defendant, for a fraudulent representation that one Hollingwood was a trustworthy man and a man of property, and that his wife had an annuity of 50*l.*; in consequence of which the plaintiff was induced to give Hollingwood credit; whereas he was in insolvent circumstances." Hollingwood being called as a witness,

(e) See post, chapter vii.

(f) Post, §§ 110, 111.

there was an objection to his competency, which the Chief Justice overruled, and he then testified "that the defendant had told the plaintiff, that he might lend him (Hollingwood) 20*l.* or 30*l.*, and that he would be perfectly safe; and that he (the defendant) would see the plaintiff paid.

Lord Ellenborough. These cases come out almost always according to the truth. A promise having been made to guaranty the plaintiff, which is within the statute, there being no note in writing, he brings an action for the misrepresentation. This is nothing more than a guaranty within the statute of frauds. Plaintiff nonsuited." There is nothing in this case, as reported, to indicate that Lord Ellenborough intended in the slightest degree to question the rule as laid down in the previous cases, particularly *Hamar v. Alexander*. It would be sufficient to distinguish the two cases, that there appears to have been no proof of a scienter in *Smith v. Harris*; but, apart from that criticism, the language of the defendant, as given by the witness, indicates rather an expression of opinion respecting his circumstances, or his honesty, than the affirmation of an existing fact; and it is evident that the so called representation was entirely subordinate to the guaranty, instead of being independent thereof, so as to be capable of being made the foundation of a distinct remedy.

§ 110. The case of *Gallager v. Brunel*, 6 Cowen (New York), 346, decided A. D. 1826, presents features in some respects similar to those of each of the two cases last cited, although neither of them was referred to in the argument or in the opinion; which is the more remarkable, because the second count of the declaration appears to have been framed, with the hope of bringing the case within the opinion of Sir James Mansfield, in *Hamar v. Alexander*. There the first count of the declaration averred, in substance, that C. and H. proposed to purchase from the plaintiffs a quantity of cotton, at a certain price, part to be paid for in cash, and part by their notes, indorsed by the defendant at four months; that they were

then unable to pay for the cotton, and that the plaintiffs were unwilling to sell it on their sole credit; and that the defendant, well knowing these facts, but contriving, etc., falsely and deceitfully represented to the plaintiffs, that he was willing to indorse the proposed note; and thereby induced the plaintiffs to sell and deliver them the cotton; whereas, in truth, he was not willing, and did not mean or intend to indorse the note, whereby, etc. The second count was in substance the same, except that it averred, that C. and H. were in bad credit, and unfit to be trusted; that the defendant, well knowing this, and fraudulently intending to enable C. and H. to obtain possession of the cotton, and convert it to their own use, without paying the plaintiffs for it, falsely, fraudulently, and deceitfully represented to the plaintiffs, that if they would sell the cotton to C. and H., the defendant would become answerable to the plaintiffs for so much of the price as should be unpaid, by indorsing the notes of C. and H., etc. The defendant demurred to the declaration, and the court gave judgment for the defendant upon the demurrer, Woodworth, J., delivering a *per curiam* opinion. He said that the declaration was bad in substance, for not averring that a note was ever made by C. and H., and presented to the defendant for indorsement; but, as the decision upon that point alone would only postpone the question, he would consider it upon its merits. Even supposing, he said, that the contract was in writing, the plaintiffs cannot say that they have the election to turn the action into one for deceit; unless the case is such, as not only to render the party liable, upon the contract, but also to sustain an action for deceit. "For example," the learned judge said, "suppose A represents B to be solvent, knowing it to be false, whereby B obtains credit; but notwithstanding this representation, the seller takes from A his written stipulation to guaranty the payment. In this case I perceive no objection to a creditor's election of the remedy." But, he added, the intention of the party not to fulfil the contract, is not one of the fraudulent acts which render him liable in an action for deceit; in such cases the

general ground of liability rests upon the affirmation of a fact as true, which, at the time, he knows to be false, and by means whereof, credit is obtained. Here there was no necessity of relying upon the representation or promise of the defendant. The plaintiffs had only to insist that the note should be drawn and indorsed, *pari passu* with the delivery of the goods; hence if they suffer, it is owing to their own negligence and misplaced confidence. He then cites several of the previous cases, in all of which the gravamen of the action was the false affirmation of an existing fact; not a promise to do a future act, at that time not intended to be performed, and which, notwithstanding the intent, might or might not be performed. (g)

§ 111. The rule intimated in the opinion of Woodworth, J., in the case last cited, was fully recognized and adopted in *Shaw v. Stine*, 8 Bosworth, 157, decided in the New York Superior Court, A. D. 1861. There the action was to recover the value of goods sold by the plaintiffs to Cohen & Mendel, of Cincinnati, upon fraudulent representations of the defendants respecting their responsibility; and the proof showed that after the representations were made, one of the plaintiffs, who transacted the business on behalf of his firm, said that he was not satisfied; and the defendants then offered and agreed to indorse Cohen & Mendel's note, on being paid two and a-half per cent therefor. The goods were then delivered, but the note given by Cohen & Mendel therefor was not paid, nor was it indorsed by the defendants. Upon the trial, the judge charged the jury that if the plaintiffs relied on the indorsement, and not on the representations, they should find for the defendants; but if the goods were sold upon the faith of the representations, they should find for the plaintiffs; and he refused to charge, as requested by the plaintiffs' counsel, that if the representations in any degree contrib-

(g) See *Boyd v. Stone*, 11 Massachusetts, 342, A. D. 1814, where there was a similar ruling in a case arising under the fourth clause of this section.

uted to induce the plaintiffs to sell the goods, the plaintiffs were entitled to recover. The defendants had a verdict, and the judgment thereon was reversed upon an exception taken to the refusal to charge; the Court saying that the charge seemed to contain an intimation to the jury, that the plaintiffs could not recover, unless they sold the goods solely upon the faith of the defendants' representations; and to leave it to the jury to determine, upon which one of the inducements the plaintiffs parted with their property. The opinion (per White, J.) states the rule as follows: "A true test in such cases may be found in the inquiry, whether the plaintiff would have sold the goods if the false representations had not been made? If he would, then the false representations did not contribute to the sale, for he would have made the sale without them. But if he would not have sold them without the representations, then they contributed to the sale; and the party making them is responsible for the damage which the plaintiff suffered, notwithstanding that other equally powerful motives may have influenced his mind at the same time in the same direction, and without the existence of which he would not have come to the conclusion to sell. It is plain that each one of several concurring considerations or motives, may be so necessary to induce the performance of an act, that, in the absence of any one of them, the act would not be done; and when they are all thus necessary, and all concur, each one of them must be deemed to have aided in producing the act and its consequences. In the case before us, the two things, the representations made by the defendant respecting the responsibility of Cohen & Mendel, and the supposed security furnished by the indorsement of Stine & Mendel (the defendants), may have *both been necessary* to the conclusion to which the plaintiffs finally came, to sell the goods to the Cincinnati firm. Neither separately might have been a sufficiently powerful inducement, while both united would be." (h)

(h) See also *Thompson v. Bond*, 1 Campbell, 4, where it was held that a fraudulent representation that the party to whom goods have been delivered was authorized to pledge a third person's credit therefor, will not prevent a recovery in assumpsit against the party himself, if the seller in fact gave credit to the person to whom the delivery was made.

ARTICLE III.

Where a promise has been made to do some act, tending to the discharge of a liability of a third person to the promisee, but not directly "to answer for" the same.

§ 112. The expression "to answer for," apparently implies that the cases for which the statute intended to provide, are those where the promisor enters into a direct undertaking, to assume a liability resting upon a third person, either absolutely or in case of the latter's default. Consequently a promise is not within the language of the statute, which does not in terms bind the promisor to discharge such a liability, although it contemplates the performance of some act tending to effect such a discharge, and the damages for its breach would be measured by the amount of the demand. Whether such promises, although not strictly within the letter, are not so far within the meaning of the statute, as to be included within its provisions, is a question of considerable difficulty; which has been much debated; but the weight of authority apparently favors the negative conclusion.

§ 113. Thus, in a *nisi prius* case which has been much criticised, *Jarmain v. Algar*, 2 Carrington and Payne, 249, and *Ryan and Moody*, 348, decided A. D. 1826, the declaration stated that one Flack was indebted to the plaintiff; and for the purpose of recovering his debt by action, the plaintiff had caused to be issued against him a latitat, indorsed for bail for 34*l.*; whereupon, in consideration that the plaintiff would forbear to arrest Flack upon that writ, the defendant undertook to execute a bail bond for Flack, upon process to be issued to Sussex or Middlesex at the suit of the plaintiff, when tendered to him, within one week from the time of making the promise. The declaration then averred the issuing of process to Middlesex; the tender of a bail bond to the defendant; and his refusal to execute it. At the trial, the plaintiff proved a written undertaking of the tenor stated in the declaration; but it contained no expression of the consideration. The defendant's counsel asked for a nonsuit on two

grounds, namely, that the writing was insufficient within the statute of frauds, and that the plaintiff had failed to prove a sufficient tender of a bail bond for execution by the defendant. Abbott, C. J., said: "As at present advised, I think this undertaking is not within the statute of frauds, and is not a promise to answer, etc., within the meaning of its provisions." With respect to the other point he thought that it had better be reserved till after the verdict; and the jury having found for the plaintiff, he held that the plaintiff had failed to prove the tender, and on that ground directed that a nonsuit should be entered, with leave to the plaintiff's counsel to move to enter a verdict for the plaintiff; but the report states that no motion was ever made.(a)

§ 114. The case of *Bushell v. Beavan*, 4 Moore and Scott, 622, and 1 Bingham's New Cases, 103, decided in the English Common Pleas in 1834, involves a similar principle; and it is of much greater weight as authority than the preceding; as it was elaborately argued, and carefully considered by a full court. The action was brought to recover damages, for the failure to procure the signature of one Macqueen to a written guaranty; and also upon a guaranty of the same general tenor signed by the defendant himself; but, as the court were with the defendant upon the last mentioned cause of action, the first only will be referred to here. At the trial it appeared that the plaintiffs were the owners of the ship *Warrior*; and she, needing some repairs, had gone into the dock for the purpose of having them made; the plaintiffs and one Sempill having previously entered into a charter-party for the hire of

(a) The case of *Elkins v. Heart*, Fitzgibbon, 202, A. D. 1731, was similar to this, being an action upon a promise that J. G. should not go beyond the kingdom without paying a debt due from him to the plaintiff, made in consideration of forbearance in an action brought against the said J. G. by the plaintiff. The plea was that there was no note in writing, etc., to which the plaintiff demurred. The report says: The court "inclined that there was a new consideration, and therefore it was not for the debt of J. G., and so not within the statute; sed adjournatur."

the ship to Sempill, after the repairs should be completed. In fact the ship was not ready for sea within the time provided for by the charter party; and for that and other reasons a dispute arose between the plaintiffs and Sempill, in consequence of which the plaintiffs refused to allow the ship to go to sea. After considerable negotiation, the dispute was finally settled, Sempill securing the plaintiffs satisfactorily for six months hire of the ship; and in addition it was one of the terms of settlement, that the defendant should procure T. P. Macqueen to sign a certain document, which was drawn up and assented to by the parties; by the terms of which, after reciting that the charter party had been entered into; that Sempill had secured the payment of the freight for the six months, and was about to leave England in the ship; Macqueen, in consideration thereof, agreed to guaranty "the due and faithful payment of all freight, for the use or hire of the said ship, which shall or may become due and payable from the said H. C. Sempill, for any period beyond the said six months." The defendant at the foot of a copy of the written guaranty, prepared for Macqueen's signature, wrote and signed this undertaking: "I undertake to get a copy of the above guaranty duly signed by Thomas Potter Macqueen, Esq., M.P., and within a week delivered to Mr. Brittan" (the attorney for the plaintiffs). This settlement was made on the 6th of October, 1829; and in consequence of it, the plaintiffs suffered the Warrior to proceed to sea, and she sailed accordingly on the 10th of the same month. The guaranty was not executed by Macqueen, although the defendant was repeatedly applied to for that purpose; and in this action the plaintiffs claimed damages to the amount of upwards of 1500*l.*, being the amount unpaid by Sempill for the hire of the ship after the six months. A verdict was found for the plaintiffs, upon a case subject to the opinion of the court; and upon the argument the defendant's counsel insisted, among other things, that the memorandum at the foot of the letter, did not satisfy the statute of frauds, as it did not contain any expression of the consideration; and also

that as the proposed guaranty, to be signed by Macqueen, contained no expression of the consideration, the defendant was at most liable only for nominal damages, by reason of his failure to procure Macqueen to sign it.

§ 115. But on the point that the defendant's agreement was not sufficient within the statute, Tindal, C. J., delivering the opinion of the court, after reciting the facts, said: "Under these circumstances the contract appears to us not to be a contract to answer for the debt, default or miscarriage of any other person; but a new and immediate contract between the defendant and the plaintiffs. If Mr. Macqueen had signed the guaranty, that guaranty would indeed have been within the statute of frauds; for his is an express guaranty to be answerable for the freight due under the charter-party, if Sempill did not pay it. But no person could be answerable upon the promise to procure his signature, but the defendant. Sempill had never engaged to get the guaranty of Macqueen, nor had Macqueen engaged to give it. There was therefore no default of any one for which the defendant made himself liable; he did so simply upon his own immediate contract. For as to any default of Sempill in paying the freight, the action on the undertaking of the defendant, could not be dependent on that event; for it would have been maintainable, if the guaranty were not signed at any time after the day, on which the defendant engaged it should be given; that is, long before the time when the freight became payable." The learned Chief Justice next considered the question arising on the terms of the intended guaranty of Macqueen; as to which he said, that there was no consideration upon the face of it, either directly expressed, or to be supplied by fair and necessary inference. The inducement related entirely to past events; the entering into the charter-party; the payment of the six months freight by Sempill; and his intended departure in the ship. All this, he said, is "past and by gone consideration." So that if the guaranty had been executed, an action upon it would have necessarily failed,

and the defendant is therefore liable to nominal damages only. The verdict was therefore ordered to stand for the plaintiffs, but the damages were reduced to one shilling. (b)

§ 116. The decision in *Twome v. Grover*, 26 Massachusetts (9 Pickering), 306, A. D. 1830, presents a very good illustration of the same general principle. The declaration was to the effect that the defendant had entered into a contract with one Newell, whereby Newell was to build a house for the defendant, for a specified sum, payable when the house should be completed; that Newell, being indebted to the plaintiff, desired to procure from him more lumber to finish the house; and on the plaintiff refusing to sell him any more, the defendant, in consideration that he would do so, promised the plaintiff that "if he would sell and deliver to Newell, the lumber necessary to finish the house, he, the defendant, would not settle with Newell for the house, until he had given the plaintiff sufficient notice, after the completion of the house, so that the plaintiff might secure himself by process of attachment upon the defendant, as trustee of Newell, for the whole of the debt which should be then due from Newell to the plaintiff;" that the plaintiff thereupon gave Newell credit; but the defendant had settled with Newell before the completion of the house, without giving the plaintiff notice. At the trial the plaintiff was permitted to prove the promise by oral testimony, notwithstanding the defendant's objection; and he had a verdict, which the court refused to set aside. The opinion of the Court upon this branch of the case was as follows: "We think the promise is not within the statute of frauds. It is a separate, independ-

(b) See *Mallett v. Bateman*, 35 Law Journal, N. S., C. P., 40, abstracted hereafter. The cases of *Jarman v. Algar*, and *Bushell v. Beavan*, are severely criticised by Cowen, J., in his opinion in *Carville v. Crane*, 5 Hill, 483; and he apparently finds it necessary to overrule them both, in order to sustain his decision in that case. But there the promise was to become contingently liable for the debt itself, which creates a very broad distinction. See the case, cited at length, in chapter vii.

ant on a credit of six months, and charged to "Mr. Penton per Mr. Simpson." (c) The defendant not having paid at the expiration of the six months, the upholsterer, without applying to him, called upon the plaintiff; who settled the demand, and sued the defendant for the amount. At the trial the defendant took the objection, with others, that the plaintiff's undertaking to the upholsterer was a mere guaranty, and therefore void by the statute of frauds; and hence the payment, without any special request of the defendant, raised no implied promise on the part of the latter to repay. But the judge overruled the objection, and, in substance, left it to the jury to say whether the goods were furnished upon the credit of the plaintiff exclusively, to be paid for by him in the first instance, and they found a verdict for the plaintiff.

§ 161. Leave having been reserved for that purpose, the defendant subsequently moved for a rule to enter a nonsuit, which the court refused. Bayley, B., after saying that the expressions, "I'll be answerable," and "I'll see you paid," are equivocal, and that the court must look into the circumstances to ascertain whether the contract was original or collateral, added, "Here it is quite clear that the goods were furnished for Penton's benefit; but it does not appear that he said one word by which he pledged himself, so as to give Ovenston a right to call upon him." "It was left to the jury to say whether he" (Simpson) "was the original debtor, and they have found that he was. I think the jury were warranted in that finding. My opinion is founded substantially upon the facts of the case, and not on the equivocal expressions, as I consider the words capable of being explained by other circumstances. I am satisfied, that, although Ovenston was willing to see if Penton would pay, he never had a legal claim upon him, but upon Simpson only." The other judges delivered

(c) The reports differ as to whether the order was given by the plaintiff or the defendant, but they agree that the defendant directed the goods to be sent to his house.

brief opinions, to the effect that the goods having been furnished upon the credit of Simpson, and the defendant having stood by and allowed Simpson to pledge his credit for him, he became liable to repay the money paid by Simpson on his account. (d)

§ 162. The principle under consideration was again recognized in 1835 by the decision in *Andrews v. Smith*, 2 Crompton, Meeson and Roscoe, 627, which, however, chiefly turned on another point, in connection with which it is cited elsewhere. We will conclude these citations from the English reports with an abbreviation of a modern case in the Common Pleas, which shows how puzzling the application of this apparently simple principle, sometimes becomes in practice. The discussion between the court and counsel, (who made a heroic but unavailing struggle for his client against overwhelming odds,) will, it is believed, shed much light, not only upon this question, but upon some others nearly akin to it, which we shall hereafter have occasion to consider.

§ 163. In *Pearce v. Blagrove*, 3 Common Law Reports, 338, decided in 1855, the action was for money lent and paid; and the proof was that a fieri facias had issued in favor of one Jones against one Sayre, under which the sheriff's officer had levied upon Sayre's goods; and Sayre desired the plaintiff to lend him the money to pay off the execution. This the plaintiff declined to do; and soon afterwards the defendant, (but not in Sayre's presence) said to the plaintiff, "Well, pay it for me, and I will repay you." Thereupon the plaintiff paid the money to the sheriff's officer, and this action was brought to recover

(d) It seems to have been assumed, that, if the original contract was within the statute, the action could not be maintained. But it has been ruled in Massachusetts, in a very parallel case, that the objection arising out of the statute is personal to the guarantor; and, if he chooses to waive it, and pay the amount of the debt, the principal cannot object that he might have successfully resisted the creditor's claim, on the ground that the promise was not in writing. *Beal v. Brown*, 95 Massachusetts (13 Allen), 114.

it. It was objected that the promise was within the statute; but the plaintiff had a verdict, which the defendant moved to set aside. Serjeant Byles in his behalf, insisted that the payment of the money created a debt against Sayre, on the ground that it was done in pursuance of a precedent request by him. To which Maule, J., answered, that the advance to Sayre was declined; and the case was the same as if Sayre had asked the plaintiff to lend him the money, and the latter had declined; and then the defendant had borrowed the money from the plaintiff, and paid it to the officer. The counsel replied, that the plaintiff refused to make the advance on Sayre's request alone, but it was made after that request, and not the less upon Sayre's request because it was also made upon another's. Whereupon Maule, J., asked if there was a joint liability; and the counsel disclaiming the idea of a joint liability, and insisting that one liability was express and the other implied, and that the plaintiff could have sued Sayre, because Sayre assented to the advance; Cresswell, J., said, that he could not have sued Sayre, unless there was a request from him, and an advance of money upon his request; that mere assent was not sufficient; it was evidence of a request, but not equivalent to it. Jervis, C. J., added, that, upon all the facts, no action could be maintained against Sayre; that the advance was not even in his presence. Counsel still insisting that Sayre was liable, Cresswell, J., concluded by saying that he could not be liable before the advance; and, when it was made, it was made upon the defendant's request, as he said, "Pay it for me;" and so the rule was refused.

ARTICLE IV.

American cases establishing and illustrating the general rule, and upon the question of credit to the third person.

§ 164. In treating of the American cases governed by the third rule, we find ourselves embarrassed with the abundance of materials at our command. Not only are the cases very numerous, but there is a great variety in

the facts which they present, raising many nice shades of distinction respecting the correct application of the general rule; and also various scarcely less important questions of evidence, construction, and the like, peculiar to this class of cases. In making a selection among them, the earlier cases will be given, with sufficient fullness to show the origin, growth, and general application of the rule in the United States; and among the more recent cases, we shall endeavor to present those, where a similar state of facts is likely to recur most frequently, or where the case also presents one or more of the incidental questions, which we shall be called upon to discuss, before taking leave of this branch of our subject.

§ 165. But first we have to notice a dictum, which, though proceeding from an eminent source, and referred to with approbation by several judges, is at war with the principle settled by a great number of cases, and has never been accepted as authority. In *D' Wolf v. Rabaud*, 1 Peters, 476, A. D. 1828, (a) the question arose as to the sufficiency of a written agreement to satisfy the statute of frauds, and the admissibility of parol evidence to supply its deficiencies; but, in pronouncing judgment, Mr. Justice Story took occasion to express his dissatisfaction with the doctrine, that the statute applies to every case, where the collateral promise (so called) was a part of the original agreement, and founded upon the same consideration. (b) But the learned Justice at the same

(a) S. O. in the court below, 1 Paine's Circuit Court, 580.

(b) He said, "Whether by the true intent of the statute, it was to extend to cases, where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration, moving at the same time between the parties; or whether it was confined to cases where there was already a subsisting debt and demand, and the promise was merely founded upon a subsequent and distinct undertaking, might, if the point were entirely new, deserve very grave consideration. But it has been closed within very narrow limits by the course of the authorities, and seems scarcely open for examination; at least in those states where the English authorities have been fully recognized and adopted in practice. If A agree to advance

time admitted that the course of the authorities was against him, and, as we have already stated, the case went off upon the other points. In *Tounsley v. Sumrall*, 2 Peters, 170, A. D. 1829, the same Justice referred to the opinion in the preceding case, in these words: "In cases not absolutely closed by authority, this court has already expressed a strong inclination, not to extend the operation of the statute of frauds, so as to embrace original and distinct promises, made by different persons at the same time, and upon the same consideration." (c)

§ 166. In New York the principle established by the English cases, seems to have been first presented for direct adjudication, in *Chase v. Day*, 17 Johnson, 114, decided in 1819. (d) The action was to recover the value of certain

B a sum of money, for which B is to be answerable, but at the same time it is expressed upon the undertaking that C will do some act for the security of A, and enter into an agreement with A for that purpose, it would scarcely seem a case of a mere collateral undertaking, but rather, if one might use the phrase, a tri-lateral contract. The contract of B to repay the money is not coincident with, nor the same contract with C to do the act. Each is an original promise, though the one may be deemed subsidiary or secondary to the other. . . . The credit is not given solely to either, but to both, not as joint contractors upon the same contract, but as separate contractors upon co-existing contracts, forming parts of the same general transaction."

(c) The distinguished tribunal, in which the foregoing remarks were made, has not since had occasion, it is believed, to affirm or deny their correctness by its decision. But an expression in the opinion of Mr. Justice Clifford, in *Emerson v. Slater*, 22 Howard, 28, indicates that it is prepared to follow the rule now so generally recognized, with respect to promises of this character, even in cases not arising in states, whose courts have, in express terms, adopted the English rule. He says: "Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are, in general, within the statute of frauds." Although in a few instances, opinions have been expressed in some of the state courts approving, upon principle, Judge Story's suggestion of a tri-lateral contract, the author's researches have not enabled him to find a solitary case where such a theory has been practically applied to a decision.

(d) But it is recognized as law, in the opinion of Kent, C. J., in *Leonard v. Vredenburg*, 8 Johnson, 23, A. D. 1811.

newspapers delivered by the plaintiff, a printer, to the nephew of the defendant, who was a news-carrier, and the proof was that the defendant called at the plaintiff's office, in his nephew's absence, and after inquiring the terms, said, "If my nephew should call for papers, I will be responsible for the papers that he shall take." Soon afterwards the nephew called for newspapers, and said that his uncle would be responsible for them, and the plaintiff furnished them to him then, and for several weeks afterwards; no regular charge for the papers was made to any person upon the plaintiff's books; but he kept a memorandum of the number delivered to the nephew, under the latter's name, as he did with other news-carriers. The plaintiff recovered (in a justice's court), and the Supreme Court on certiorari affirmed the judgment; holding that the evidence warranted the inference, that "the credit was given originally and solely to the defendant;" and "that this never was the debt of the nephew. His uncle made the contract; and the nephew, when he took the papers, explained that his uncle would be responsible for them."

§ 167. In *Brown v. Bradshaw*, 1 Duer, 199, A. D. 1852, a verdict for the plaintiffs, rendered under a proper charge of the judge at the trial, was set aside by the New York Superior Court, as against the weight of evidence. The complaint claimed to recover for lumber delivered to the defendant; and the evidence showed that it was delivered upon the application of one M., to be used in the construction by him of certain houses, upon land belonging to the defendant, but which the defendant had contracted to sell to M. at a specified price. The contract between the defendant and M. also provided, that the defendant should make advances to him, to aid in the erection of the buildings; the advances and the purchase price of the land to be paid when the deed was given; and it also contained a clause providing that all bills for materials for the houses, which the defendant might pay or incur, should be deemed part of the advances. The evidence, in its most favorable aspect, tended

to show that the plaintiffs delivered the lumber to M. upon the defendant's promise to one of the plaintiffs, "that he would see him paid for all the lumber delivered at those buildings." A bill for the first seven items of the account had been made out by the plaintiffs in the name of M.; and a payment made by the defendant upon the general account, had been rec-ipted by them, as paid by the defendant for M. There was some evidence that after the debt had been contracted, the defendant agreed with M. to pay all the outstanding bills, as part of the consideration of an assignment of his contract to another person; but the court disregarded it, on the ground that it did not sustain the cause of action stated in the complaint, which was a sale of the lumber to the defendant. With respect to the original transaction, the court held that the evidence established, "that the lumber was furnished to M. on his application and on his credit," because it showed, that "the lumber was charged to M., and not to the defendant; that the moneys paid by the latter to the plaintiffs were paid by the defendant, and accepted by the plaintiffs, as a payment on account of a debt owing to them by M.;" and "that there is no evidence which authorizes a court or jury to find that no credit was given to M., but that it was given exclusively to Bradshaw and with his assent."

§ 168. In another case decided on the same day, *Flanders v. Crolius*, 1 Duer, 206, A. D. 1852, the same court refused to set aside a referee's report in favor of the plaintiff, as against the weight of evidence. The action was for the balance due upon an account for goods furnished to the defendant's brother, upon the defendant's saying that the plaintiff might deliver goods to his brother, "and he himself would be responsible for the amount of all bills for goods sold and delivered." The goods were originally charged to the defendant, and the defendant having heard from his brother that the latter was buying goods from the plaintiff in his name, had only answered, "Joe, mind and pay Flanders." It was held that this evidence justified the conclusion of the referee, that the

goods were purchased by, and the credit was given exclusively to the defendant.

§ 169. The following cases were decided in the New York Common Pleas: In *Dixon v. Frazee*, 1 E. D. Smith, 32, A. D. 1850, goods had been delivered at different times by the plaintiff to the defendant's son, at the request of the defendant and on his promise, made at the time the account was opened, "that he would see that the plaintiff was paid;" but they were charged to the son, or a firm of which he was a member, and from time to time the accounts were settled by notes of the son or of the firm. The action was brought for goods delivered since the last settlement by note, but notes of the son had been taken on account for part of the amount. A verdict having been rendered for the plaintiff, the court on appeal reversed the judgment; the charge having been indefinite, and the court holding that the jury should have been positively instructed to find for the defendant, as the evidence showed clearly that the son was liable, and that the plaintiff relied on him for payment. On the other hand in *Briggs v. Evans*, 1 E. D. Smith, 192, A. D. 1851, the plaintiff's assignors had manufactured certain furniture on the order of a third person, to be paid for in cash, and had made out a bill to him; but, on his requesting credit, they refused to deliver the goods; whereupon the defendant took the bill, requested them to deliver the goods, and promised to pay the bill in two weeks; relying upon which promise, the goods were delivered to the third person, and charged to the defendant. The court, holding that the whole credit was given to the defendant, affirmed a judgment (of the Marine Court) in favor of the plaintiff.(e)

(e) Woodruff, J., in delivering the opinion of the Court in this case, said: "The promise was in form absolute, and was relied upon as such. Where the promise in such case was absolute in form to pay, the court must, as matter of law, hold it to be original, unless it further appears as matter of fact that it was made and intended as collateral." "The bill" (in the name of the third person) "was therefore made, before the contract was made upon which the plaintiff relies, and proves nothing respecting the character of that contract."

§ 170. In *Pennell v. Pentz*, 4 E. D. Smith, 639, A. D. 1855, in the same court, the plaintiff's assignor was applied to by one B. to furnish stone, to enable B. to fulfil a paving contract with the city of New York, which he declined to do, unless B. would procure "guaranty for payment of the amount;" and on the defendant being applied to, he said he would not "guaranty" to pay, unless B. assigned to him the contract. B. having assigned the contract to the defendant, the latter said to the plaintiff, "You can now go on and furnish the materials for those contracts, and I will pay you; as no other person can draw the money from the corporation but me." The plaintiff's assignor thereupon furnished the stone, and after he had done so, he made out the bills to B.; but it appeared that this was done by the direction of the defendant, to enable him to secure certain commissions. It was held by a majority of the court that the promise was original, the entire credit having been given to the defendant; and the bills having been made out to B. by his direction, and for his accommodation; and a judgment for the defendant in the Marine Court, was accordingly reversed on appeal.

§ 171. In the earliest Massachusetts case in which the doctrine now under consideration came in question, *Perley v. Spring*, 12 Massachusetts, 297, decided in 1815, Chief Justice Parker recognized the distinction suggested by Lord Mansfield in *Mawbrey v. Cunningham*, and afterwards repudiated by him. In deciding that the plaintiff was entitled to judgment upon a verdict, subject to the opinion of the court, the Chief Justice distinctly stated, as one of the grounds of the decision, that the promise was prospective, to pay a debt which might accrue in consequence of the very promise which was made, and which did not exist at the time of the promise, and therefore, it was not affected by the statute.

§ 172. But in *Tileston v. Nettleton*, 23 Massachusetts (6 Pickering), 509, decided in 1828, the same court, apparently

with the assent of the Chief Justice, laid down the correct rule. The defendant was the commanding officer of a militia company, and also a member of the committee of arrangements for a celebration of the fourth of July, which included a public dinner provided by the plaintiff. The members of the company partook of the dinner, as well as the other citizens present; and while they were eating, the plaintiff sent two persons around, to collect one dollar from each of those present, to pay for his dinner. When they were proceeding to collect the money from the members of the company, the defendant stopped them, and said that they need not call upon the members of the company, as he would be responsible for them; to which the plaintiff assented, and no money was collected from them. The evidence was submitted to the jury upon a proper charge; and the court, affirming a judgment for the defendant, stated that the members of the company were the original debtors, and might have been sued severally upon an implied promise; and their original liability proved that the defendant's engagement was only collateral. (f)

§ 173. And in *Cahill v. Bigelow*, 35 Massachusetts (18 Pickering), 369, A. D. 1836, Chief Justice Shaw said, that *Perley v. Spring* was overruled by *Tileston v. Nettleton*. The question, which arose on a trustee process, was whether Hatch, the alleged trustee, was liable to the defendant, for board furnished by her upon his credit to his laborers. At the time when she opened the boarding-house, he had verbally agreed with her, and with other persons, who subsequently furnished her with provisions and supplies, that the latter should deliver the supplies to her and charge her therefor, and at the end of each quarter he would see them paid; and the demands against him by reason of this promise exceeded the amount of the defendant's bills for board. The court held, that if the

(f) There was however, a question in this case, whether the members of the company had not already become liable, when the defendant's promise was made.

trustee chose to interpose the defence of the statute of frauds, against the demands in favor of those who furnished the supplies, it would constitute a defence; because credit was given to the defendant, the supplies having been in the first instance charged to her, and she being debtor therefor. But it was also held that it was optional with the trustee, whether he would avail himself of the protection of the statute; and as he chose not to insist upon it, he was discharged from the trustee process.

• § 174. The same principle had been, however, distinctly recognized in the previous case of *Loomis v. Newhall*, 32 Massachusetts (15 Pickering), 159, A. D. 1833, which was not cited, either by the counsel or the court, in *Cahill v. Bigelow*. There the action was against an administrator, upon a promise of his intestate. It appeared that the son of the intestate, who was about forty years old, and a man without means, and of bad habits, had boarded for several months with the plaintiff, who was his uncle by marriage; and that, after the board had been so furnished, the intestate requested the son to continue to remain at the plaintiff's house, and said to the plaintiff, "For what you have already done, and what you shall do for my son, I will see you paid hereafter for your services, expenses, and trouble;" but the son remained only one day after this promise. The next day after the promise, the intestate requested the plaintiff to pay a tax against the son, promising to refund the amount, and the plaintiff paid it accordingly. The court decided that, as to the board which had already been furnished, the promise was within the statute, there being no evidence that it was furnished at the father's request; but that the promise would not have been within the statute, as to the one day's board furnished afterwards, had that been separable from the promise to pay for the board previously furnished; and that the promise respecting the tax was original, and without the statute.(g)

(g) The decision was that the plaintiff should recover only the amount paid for the tax, as the promise to pay for the board was held to be void as to that furnished subsequently as well as previously, because it was entire, and

§ 175. So in *Hill v. Raymond*, 85 Massachusetts (3 Allen), 540, A. D. 1862, the same court decided, as matter of law, that no action could be maintained for necessities furnished to the defendant's brother, (a dissipated man,) by the plaintiff, upon a verbal promise in these words: "I don't want my brother to go ragged or hungry; for any necessities of life you may furnish him, I will see you paid:" it appearing by the testimony in behalf of the plaintiff, that the plaintiff held the brother responsible for the bill and presented it to him, and took from him an order upon the defendant, which the latter refused to accept. Notwithstanding that the plaintiff, (who was sworn in his own behalf,) testified that he did not receive the order in payment of the bill, it was held at the trial, that the action was not maintainable as matter of law; and an exception to this decision was overruled, the court holding that "the defendant's promise was clearly collateral."(*h*)

§ 176. In *Swift v. Pierce*, 95 Massachusetts (13 Allen), 136, decided A. D. 1866, the action was to recover upon the defendants' verbal promise to pay for certain goods delivered to one Hoar; and it appeared that they had been charged to Hoar upon the plaintiff's books, and that the plaintiff had commenced an action for the value of the

within the statute as to a part of it; but the court subsequently granted a new trial, on the suggestion that the previous board was furnished as a matter of charity. However, in *Rand v. Mather*, 65 Massachusetts (11 Cushing), 1 A. D. 1853, the court overruled so much of the decision in *Loomis v. Newhall*, as holds that a contract void in part under the statute of frauds is necessarily void in toto. There the defendant had agreed to pay for the work previously done, and the work to be done, to complete a contract between the plaintiff and a third person, and it was decided that he might recover for work done after the promise, but not for that done previously. The case is cited again hereafter.

(*h*) The report does not state in what manner, if any, beyond presenting the bill, it appeared that the plaintiff held the person to whom the supplies were furnished, responsible for the bill; but the fact is so stated in general terms in the syllabus and in the opinion.

goods against Hoar, in which he had summoned the present defendants as trustees ; but the defendants had been discharged in the trustee proceeding, and the plaintiff had thereupon discontinued the action against Hoar. It was held that the jury was entitled to judge upon these facts, whether the credit was given to the defendants or to Hoar, and a verdict for the plaintiff upon a charge to that effect would not be disturbed ; but a new trial was granted because, although the judge charged the jury that if the plaintiff gave credit to Hoar alone, the defendants' promise was collateral, he refused to charge that the same result would follow if any credit was given to Hoar ; the court holding that there was some evidence, tending to show, that the plaintiff relied upon the responsibility of both.

§ 177. So in the case of *Walker v. Richards*, 41 New Hampshire, 388, A. D. 1860. There the declaration contained several special counts, claiming to recover for goods sold and delivered by the plaintiff, to one Davis and two other persons, in the employment of the defendant, on credit, and upon a promise of the defendant, to be responsible and see him paid ; and also a general count for goods sold and delivered to the defendant. It appeared that the plaintiff had charged the goods to the several persons to whom they were respectively delivered ; but he proved that he had done so at the request of the defendant, in order that the latter might, from time to time, see whether they were taking up their pay for their labor, faster than they were earning it. The judge charged the jury, that if the goods were delivered to Davis and the others, at the request of the defendant, and upon his absolute promise to pay for them ; and if the whole credit was given to him, and no credit was given to the workmen, the plaintiff was entitled to recover ; and a motion to set aside a verdict for the plaintiff upon exceptions to the charge was denied. Bell, C. J., said, that the special counts set forth that the goods were sold to Davis and the others on credit ; and under those counts they were the debtors, and the contract of the

defendant was entirely collateral, and could be proved only by a writing; but the declaration also contained a count for goods sold and delivered to the defendant; and under that count it was proper to prove that the sale was made, and the credit given, to the defendant alone. "The charges on the books to Davis, etc.," continued the learned Chief Justice, "are competent evidence, that the sales were made to them, and upon their credit; but they are not conclusive, and are open to explanation. It is for the jury to judge, upon all the evidence, to whom the credit was given; and whether the agreement of the defendant is original or collateral."

§ 178. In *Moses v. Norton*, 36 Maine, 113, A. D. 1853, the mother of the defendants, being in occupation of the plaintiffs' house, under a lease (apparently verbal), at a rent agreed upon, and the plaintiffs being solicitous about their rent, the defendants verbally agreed to pay the rent during the time she should occupy the house; under which agreement, she was allowed to remain for three years, she paying part of the rent and one of the defendants paying part. The action was brought for the remainder, and although counsel for the plaintiffs insisted that the entire credit was given to the defendants, (the conversation amounting to a refusal to allow her to remain, and to a reletting to the defendants,) the court held that the plaintiffs could not recover, on the ground that the mother was liable, and could not have successfully defended an action for the rent; and therefore the defendants' promise was collateral. To the same effect is *Blake v. Parlin*, 22 Maine, 395, A. D. 1843, although there the verbal lessee was moving in, when the collateral promise was insisted upon and obtained, as a condition of his being allowed to do so. And in *Walker v. McDonald*, 5 Minnesota, 455, A. D. 1861, the facts were almost identical with those in *Moses v. Norton*, except that the promise was to be "responsible" for the rent, which was held to be collateral, for the same reason.

* 179. These selections by no means exhaust the variety of the cases furnished by the American reports, illustrating the general application of this rule. From the nature of the transactions to which it applies, the variety is almost endless; each case presenting some different feature, upon which a question arises respecting the correct application of the rule. Frequently also, the same facts present embarrassing questions under some of the other rules, either separately or in connection with this. And we refer the reader, who wishes to pursue his researches further, to the numerous additional authorities in the note; which maintain, with remarkable uniformity, the same general principle; although there is occasionally, as in some of the cases already cited, a little difficulty, and perhaps discrepancy, in its application. (i)

(i) *Bates v. Starr*, 6 Alabama, 697; *Faires v. Lodane*, 10 id. 50; *Boykin v. Dohlonde*, 1 Alabama Select Cases, 502; *Kurtz v. Adams*, 12 Arkansas (7 English), 174; *Porter v. Langhorn*, 2 Bibb (Ky.), 63; *Hanford v. Higgins*, 1 Bosworth (New York), 441; *Hall v. Wood*, 4 Chandler (Wisconsin), 36; *Loomis v. Smith*, 17 Connecticut, 115; *Knox v. Nutt*, 1 Daly (New York), 213; *Hetfield v. Dow*, 3 Dutcher (New Jersey), 440; *Read v. Ladd*, 1 Edmonds (New York), 100; *Weyand v. Crichfield*, 3 Grant (Pennsylvania), 113; *Warnick v. Grosholz*, id. 234; *Price v. Combs*, 7 Halsted (New Jersey), 188; *Elder v. Warfield*, 7 Harris & Johnson (Md.) 391; *Booker v. Tally*, 2 Humphreys (Tenn.) 308; *Williams v. Corbet*, 28 Illinois, 262; *Nelson v. Hardy*, 7 Indiana, 364; *Billingsley v. Dempewolf*, 11 Indiana, 414; *Backus v. Clark*, 1 Kansas, 303; *Ware v. Stephenson*, 10 Leigh (Va.), 155; *Richardson v. Richardson*, 1 MacMullan (South Carolina), 280; *Homans v. Lambard*, 21 Maine, 308; *Doyle v. White*, 26 Maine, 341; *Ellicott v. Peterson's Exrs.*, 4 Maryland, 476; *Cropper v. Pittman*, 13 id. 190; *Leland v. Oreyon*, 1 McCord (South Carolina), 100; *Mease v. Wagner*, id. 395; *Waggener v. Bells*, 4 Monroe (Kentucky), 7; *Underhill v. Gibson*, 2 New Hampshire, 352; *Proprietors of Upper Locks v. Abbott*, 14 id. 157; *Brown v. George*, 17 id. 128; *Landis v. Royer*, 59 Pennsylvania, 95; *McCaffil v. Radcliff*, 3 Robertson (New York), 445; *Brady v. Sackrider*, 1 Sandford (New York), 514; *Darlington v. McCunn*, 2 E. D. Smith, 411; *Hazen v. Bearden*, 4 Sneed (Tennessee), 48; *Hoppock v. Wilson*, 1 Southard (New Jersey), 149; *Scudder v. Wade*, id. 249; *Rhodes v. Leeds*, 3 Stewart & Porter (Alabama), 212; *Arbuckle v. Hawks*, 20 Vermont, 538; *Gleason v. Briggs*, 28 id. 135; *Hodges v. Hall*, 29 id. 209; *Walker v. Norton*, id. 226; *Bushee v. Allen*, 31 id. 613; *Rogers v. Knéeland*, 13 Wendell (New York), 114; *Turton v. Burke*, 4 Wisconsin, 119. Some of these cases will also be found in the third article of the ninth chapter, where a question very analogous to that which is now under examination will be discussed at length; and many of the cases there cited are also applicable here.

ARTICLE V.

How far the question, whether the promise was original or collateral, belongs to the jury.

§ 180. It is very evident, that where the language used, by the promisor, was pertinent to the creation of an absolute and direct undertaking to respond for the price, and at the same time the conduct of the third person was consistent with his assumption of a concurrent liability therefor; but there is no evidence of an express assent on the part of the promisee, to the third person's assumption of liability, the question to whom credit was given belongs exclusively to the jury.^(a) So also, where the testimony leaves it doubtful what was the language used by the parties, it is the province of the jury to determine, under the directions of the court respecting the effect of particular modes of expression, whether the promisor in fact undertook to respond absolutely, or only in case the third person did not pay. Again, where there is no question what were the words used, but they are susceptible of two meanings, the one importing an absolute, and the other a conditional promise, the question is necessarily referred to the jury, to determine in what sense they were in fact used and accepted. And in that respect, it is believed that the rule would be the same, if the contract between the parties was proved by a writing, containing words of equivocal meaning, even if no question arose under the statute of frauds.^(b)

(a) See ante, article ii.

(b) The point has sometimes arisen in cases under the statute of limitations, when the question was, whether a writing of equivocal meaning contained an acknowledgment of the debt or a new promise. Thus, in *Lloyd v. Maund*, 2 Term Reports, 760, A. D. 1788, it was held, that a general ruling at the trial, that an ambiguous letter did not amount to a new promise or acknowledgment was erroneous, and a nonsuit was set aside, one of the judges saying, that "the jury should have put their construction upon it." In *Frost v. Bengough*, 1 Bingham, 266, A. D. 1823, the question was, whether a letter from the defendant, saying that he "must arrange matters" with the plaintiff, was sufficient, and the court held that it was properly left to the jury to say whether there were any other matters to which the letter referred.

§ 181. But some of the cases decided under the statute of frauds have gone further; and expressions will occasionally be found in the books, leading to the inference, that the jury are entitled in all cases, to pass upon the question, whether the words used imported an absolute or a conditional promise. Thus it was said in one case, *Warnick v. Grosholz*, 3 Grant (Pennsylvania), 234, that "where words are written, the general rule is that the court shall interpret them; but, when they are merely spoken, their sense and meaning intended are for the jury; their meaning being fixed by the jury, their legal effect and consequence are determined by the court."

§ 182. This question sometimes becomes of vital importance; for the rights of the parties may depend entirely upon the construction, to be placed upon words, concerning which the witnesses do not essentially differ. As will be more fully shown in the next chapter, there is a disposition, especially in the modern decisions, to assign to particular forms of expression, in most common use in transactions of this kind, certain definite *prima facie* meanings. In the case of *Warnick v. Grosholz*, one of those expressions was used, the promise having been that the defendant would see the plaintiffs paid, which, it is said, upon very respectable authority, presumptively imports only that the defendant would pay, in case the third person did not; and it may be that he was defeated by leaving the question to the jury, without the production of any evidence on the part of the plaintiff, to control that *prima facie* meaning of his promise.

§ 183. It is believed that the distinction, suggested in that case, between written and spoken words, has no substantial foundation; and that when the court can clearly

And in *Dodson v. Mackey*, 4 Nevile and Manning, 327, A. D. 1835, it was held that the judge at the trial properly left it to the jury, to say whether an ambiguous letter amounted to a promise to pay the debt, and if so, whether the promise was conditional or absolute. See several other cases cited in Angell on Limitations, § 238.

ascertain from the testimony, what the words really were, the determination of their meaning and the nature of the contract which they create, is to be made as a matter of law. This proposition is subject, of course, to the exception already mentioned, where words of equivocal meaning have been used ; or, what amounts to nearly the same thing, where the law assigns to the words "a prima facie meaning" only, and there is some evidence of their having been used in a different sense.

§ 184. Thus, in *Robinson v. Gilman*, 43 New Hampshire, 485, the court below, in passing upon the validity of a set-off, had ruled, in substance, that a conversation, proved to have taken place between the witness and the plaintiff's intestate, did not amount to a promise to pay the debt ; and Bell, C. J., delivering the opinion of the Supreme Court, granting a new trial for that reason, with others, said : "The language used does not necessarily import that he would settle, or cause the notes to be settled. The terms were loose and indefinite ; and the question really was, whether the jury, weighing the evidence and the circumstances, could rightfully understand the language to be an engagement to cause the debt to be paid, or to pay it." "In many cases it is not so much the question what terms were used, as what was intended. Where the words are certain, it is generally for the court to construe them ; but, where the jury must decide what was said, they must also judge what was the meaning of the parties, in the language they are found to have used. If the evidence tends to prove an engagement inconsistent with that alleged, and it is capable of no interpretation that can be reconciled with it, the court may pronounce the evidence incompetent on the ground of variance ; but, where the evidence admits of being understood in a sense which would support the declaration, and the doubt is whether it is quite sufficient to support the writ, it seems generally more advisable to leave the question to the jury, who are supposed to be more able to judge of the weight of testimony, as to the facts, than the court."

§ 185. So, also, in *Sinclair v. Richardson*, 12 Vermont, 33, the same idea was very clearly stated in the remarks of Collamer, J., although they were directly applicable to a state of facts depending upon a different rule. In discussing the question, whether it belonged to the court or to the jury, to determine, if proof of a certain conversation between the parties, tended to show an abandonment by the plaintiff, of a written contract between himself and a third person, and the formation of a new contract between the plaintiff and the defendant; or, on the other hand, merely a guaranty by the defendant of the third person's performance of the former contract, he said: "If the terms used on the occasion clearly imply that the former contract is to continue, and the new one be auxiliary thereto, then it is matter of law that the new contract must be in writing. Such as the saying, 'proceed, and if he does not pay you, I will.' But if the terms be uncertain, equivocal or ambiguous, then it must always be left to the jury, to find whether in fact the former contract was to continue, or whether the whole was abandoned, and the new contract and credit substituted in its place." (c)

§ 186. The distinction arising in cases where the testimony is conflicting, is also illustrated by the case of *Homans v. Lambard*, 21 Maine, 308, where the defendant's counsel contended, that the judge at the trial erred, in leaving it to the jury to say, whether certain timber, for the value of which the action was brought, was furnished by the plaintiff upon the credit of the defendant, or of the third person; insisting that certain words, proved to have been spoken by the defendant, implied a conditional contract, and should be so construed as matter of law. But Tenney, J., in his opinion, said, that although it would have been the duty of the court to construe a written promise in those words, there were in this case other conversations between the parties, and also between the

(c) See, also, per Woodruff, J., in *Briggs v. Evans*, ante, § 169, note.

plaintiff and others, in the presence of the defendant, which had a tendency "to manifest to the defendant the views entertained by the plaintiff on the subject of the sale of the timber;" and that other facts were in evidence, which might have had an important influence, in satisfying the jury of the true character of the transaction. "It was," he added, "for them alone to judge, from the evidence, what was said and done, and then to determine therefrom the intention of the parties. It would have been a manifest invasion of their rights, for the court to select a particular portion of the evidence, which the jury might, or might not believe, and as a matter of law, inform them, that their verdict must depend upon the construction which the judge should give to that, independent of other facts in the case. The meaning of the parties was to be gathered from all the evidence before them."

§ 187. So, also, in the recent case of *Perkins v. Hinsdale*, 97 Massachusetts, 157, A. D. 1867. The action was to recover for articles delivered to the nephew of the defendants, who were brothers and partners. At the trial, the plaintiff testified in substance, that there had been dealings between him and the nephew, but the last credit he gave him was on the 16th of September, 1865; that on the 25th of that month, one of the defendants applied to him to give the nephew further credit, stating various circumstances, tending to show that he would be safe in doing so; but the plaintiff refused, unless the defendants "would become responsible." That thereupon the parties made an oral contract, to the effect that the plaintiff would deliver to the nephew such goods as he wanted, and the defendants "would pay the bill;" that the plaintiff would "go along with him" each month; and if, by the 15th of the next month, the nephew had not paid the monthly bill, the plaintiff would notify the defendants, and they would pay it. That he delivered the goods, and notified the defendants accordingly; and that the credit was given solely to the defendants, but the

accounts were kept with the nephew as before. Other witnesses, on the part of the plaintiff, testified that the conversation was, in substance, that the nephew was to be "pushed up" till the 15th of each month; and if he did not pay then, the defendants would pay the bill, or see it paid. Evidence was introduced by the defendants, tending to disprove the testimony on the part of the plaintiff, as to the material points of this conversation; but on cross-examination of the defendant, with whom it took place, he admitted sending a letter to the plaintiff's attorney, inclosing a payment on account of the demand, and saying, "I hope to see my responsibility liquidated soon." Upon this evidence, the defendants contended that they were entitled to a verdict, by direction of the court; but the plaintiff insisted that he had the right to go to the jury, upon the question to whom the credit was given. The judge directed a verdict for the defendants, which was set aside on exceptions. Hoar, J., delivering the opinion of the court, said that the evidence was strong, to show that the contract was collateral; but the plaintiff, in one part of his testimony, expressly stated that the sole credit was given to the defendants; and the letter "has some semblance of an admission of an original and direct responsibility." "Considering, therefore," he proceeded, "that the evidence was chiefly oral, not absolutely distinct in its terms, or consistent in its different parts; and that its effect depends partly upon inferences to be drawn from it; we think, on the whole, that it should have been submitted to the jury, under proper instructions, to determine the question what the contract was, as a question of fact, and that the court should not have decided it."

§ 188. And it would also seem, that in all cases where the words are susceptible of more than one meaning, the question is not in what sense the promisor intended to use them, but in what sense the promisee received them. The language having been selected by the promisor, and being pertinent to either species of engagement, should be

regarded as a tender of either to the promisee for his acceptance. A very striking illustration of its application in this particular connection is furnished by the decision of the King's Bench in *Oldham v. Allen*, A. D. 1784, a case mentioned by Bayley, B., in the course of his opinion in *Simpson v. Penton*, 2 Crompton and Meeson, 430;(d) but nowhere reported. "There," said Bayley, B., "the defendant had sent for a farrier to attend some horses, and said to the farrier 'I will see you paid.' The plaintiff knew the parties who were owners of some of the horses, and made them debtors; but debited the defendant for the others, whose owners he did not know; the court held that the promise was original in respect of those owners whose names he did not know, but in respect of the others whom he did know, that it was collateral." The same language was construed in this case to raise at the same time two different contracts between the same parties; for no other reason than because it was pertinent to both contracts, and the circumstances of the case showed that the promisee, by the mere operation of his own mind, divided the subjects of the promise into two classes, as he had a right to do by the terms of the promise.(e)

(d) *Ante*, § 160.

(e) We append abstracts of two cases illustrating the principles discussed in the text, although no question arose in either, growing out of the statute of *frauds*. *Sproat v. Matthews*, 1 Term Reports, 182, A. D. 1786. This was an action by an indorsee of a bill of exchange against the acceptor, and the question was whether there had been a valid acceptance. The proof was, that on the 24th of September, the plaintiff's clerk presented the bill for acceptance, and the defendant replied that the drawer had consigned a ship and cargo to him at London and to another person at Bristol; but as he could not tell whether the ship would arrive at London or Bristol, "he could not accept at that time;" upon which the clerk left the bill, with the understanding, assented to by the defendant, that if the defendant did not accept it from the day when it was presented, he should be at liberty to note it for non-acceptance as from that time. On the 8th of October, the clerk called again with the plaintiff; and the defendant replied, that "the bill was a good one and that it would be paid, even if the ship were lost." The clerk thereupon took the bill to a notary, and had it noted for non-acceptance, as of the 24th of September. Afterwards the ship arrived at London, and the defend-

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ARTICLE VI.

Materiality of entries in the promisee's books, and of other acts to which the promisor was not a party.

§ 189. One question of frequent occurrence, and which has given rise to some conflict of opinion, is whether the promisee is entitled to introduce testimony of certain acts, to which the promisor was not a party, tending to show that he was regarded by the promisee as the sole debtor;

ant received and disposed of the cargo. Buller, J., nonsuited the plaintiff, and a rule nisi for a new trial was discharged after argument. Willes, J., thought that a new trial should be granted. He said that the defendant accepted the bill upon two conditions, namely, that the ship should arrive at London, or that she should be lost; in either case, (she being insured,) the defendant could have indemnified himself out of the cargo, but not if she had arrived at Bristol; and if there was a doubt whether it was a conditional or absolute acceptance, or whether (if conditional) the plaintiff had precluded himself by his subsequent conduct, the question should have been left to the jury. Ashurst, J., thought the nonsuit was correct. He agreed with his brother Willes, respecting the meaning of the conversations, as being a conditional acceptance, which the plaintiff afterwards waived; and he said that if the parties at first understood that the matter was left unconcluded, "the plaintiff is absolutely bound by his subsequent act" in protesting the bill, so there was nothing to leave to the jury. Buller, J., said that the court was now called upon to determine a point of law; which was decisive that the question ought not to have been left to the jury. That the defendant's counsel admitted the evidence to be true, but insisted that upon that evidence the defendant was not liable in point of law, so there was nothing for the jury. If he had insisted that the witness was mistaken, that might have been properly left to the jury. He then agreed with the other two as to the meaning of the conversations, and added: "This, therefore, was a conditional acceptance; and in these cases the holder may choose whether he will be satisfied with it or not; but here the plaintiff has waived it by protesting the bill for non-acceptance." *Thruston v. Thornton*, 55 Massachusetts (1 Cushing), 89, A. D. 1848. The action was to recover for services as a broker on the sale of real estate; and at the trial the principal question was, whether the defendant employed and promised to pay the plaintiff. Upon that point, the evidence on the part of the plaintiff related entirely to a conversation between the parties; in which the defendant expressed a wish to sell the property, and the plaintiff inquired whether he would pay a commission for that purpose; to which the defendant replied, that he would pay a commission to any person, who could effect a sale upon his terms.

as, for instance, that the promisor, and not the third person, was debited with the goods, money, or other subject of the contract. It will be seen that much stress has been laid upon the debit entries, in several of the cases, which have been abstracted in the preceding pages. And it is conceded, that wherever there is doubt to whom the credit was given, the fact that the third person was debited in the promisee's books, with the price of the subject of the contract, raises a presumption that the undertaking of the promisor to respond was collateral, so strong that some satisfactory explanation must be given, to prevent its becoming conclusive. But it has been sometimes supposed that the contrary rule would not apply, when the promisor was similarly debited.

§ 190. Such a suggestion was made in *Cutler v. Hinton*, 6 Randolph (Virginia), 509, which will be cited again

The defendant's evidence was apparently confined to the question of fact, whether any such conversation took place. The judge instructed the jury, that if they should be satisfied that the conversation took place, then, in order to determine whether the defendant was liable in this action, it would be necessary for them to understand what constitutes a legal and binding contract. And for that purpose he delivered to them a short disquisition upon the legal definition of a contract; and added comments appropriate to the evidence, the substance of which was, that when the parties are face to face, one must then make an offer, and the other must then accept it; unless it is expressly agreed, that the one to whom the offer was made, shall have time to consider it. In view of these instructions, they were directed to inquire whether "the minds of the parties met, and they made a legal and binding contract; or whether the transaction was, as contended by the defendant, a loose conversation not understood or intended by them as an agreement." The jury having found a verdict for the defendant, the plaintiff moved for a new trial on exceptions, contending that there was no necessity for a formal acceptance of the defendant's offer; and that if the plaintiff acted in consequence of the defendant's offer, he was entitled to recover. But the exceptions were overruled, the court saying, "It was for the jury to decide what was the meaning and intention of the parties. The conversation was loose and indefinite, and the jury, we think, might well find as they did, that no contract was in fact made. But however this may be, it was a question of fact for the jury, and we think they were in no respect misdirected."

in the next chapter,(a) where Carr, J., delivering the opinion of the court, after referring to the fact that the goods were originally charged to the defendant, and not to the third person, added: "It seems to me that such entries, made in the books of merchants, are better evidence against than for them. Where they charge the goods to the person to whom they are furnished, it is strong to show that they consider themselves dealing with him; and, like the admissions of a party, may be safely taken against them; but it would be of dangerous tendency to say, that by an entry made by themselves in their own books, they could change the complexion of their case, and make that an original, which would otherwise have been a collateral promise." In that case, however, the promise was held by the court to be collateral by its terms; and nothing could be more proper, than a ruling that the other party could not, by any act of his own, change it into an original promise.

§ 191. Precisely the same observation applies to the remarks of the court in another case, which has also been cited as authority, against the admission of evidence that the goods were originally charged to the promisor; that of *Kinloch v. Brown*, 1 Richardson (South Carolina), 223.(b) There, also, the promise was held to be collateral by its terms; and after saying that the only evidence given, was that the defendant had promised to guaranty the payment of a debt contracted by one H., the court added: "This, however, it is said, is not the sense in which the plaintiffs understood it, and in support of it, their entries are appealed to; but, it must be remembered, that the entries are evidence of nothing, save the fact of the delivery of the specified articles and their prices. On whose credit, where the person's liability is in question, they were delivered, must appear aliunde. The testimony of H. is, that he explained to Mr. Kinloch that the defendant was

(a) Section 203.

(b) Cited also in chapter vii; see § 199.

to be security, and see him paid. This is enough for that view of the case; but if Brown's promise was only collateral, and the plaintiffs thought proper to consider it as original, that will not help them. The defendant's liability is to be tested by his undertaking. This is stated again and again by H. to be that 'if he (H.) did not pay the amount to the plaintiffs, Brown would have it to pay.'"

§ 192. These cases therefore prove nothing, except that where a promise is collateral by its terms, the promisee cannot change it into an original promise, by proof that he received it as original; a proposition which admits of no question; and, in truth, it is fairly deducible from the remarks of the court in *Kinloch v. Brown*, that the plaintiff's entries would be competent evidence of his understanding of the transaction, whenever that was material to the issue. But there is another criticism to be made upon the remarks quoted from the South Carolina case, which is, to some extent, applicable also to the Virginia case. In the former case certainly, and probably also in the latter, they apply, not to a general and common-law rule of evidence, but to a local rule, established by statute and custom in several states, including South Carolina and Virginia; whereby a plaintiff is allowed to give in evidence entries in his books, accompanied by his suppletory oath, to prove the items of an account upon which an action is brought.(c)

(c) Mr. Browne, in his *Treatise on the Statute of Frauds*, § 198, says, that "though the debiting of the third party on the plaintiff's books, or the presentation of the account to him, is evidence *against* the plaintiff, to show that he gave credit to the third party, so as to render a writing necessary to hold the defendant; his debiting of, or presenting the account to the defendant, is not evidence *for* him to show that he trusted the defendant only, while, in fact, the goods were delivered, or the services rendered to the third party." The authorities cited are *Cutler v. Hinton*, and *Kinloch v. Brown*, which are criticised in the text; and also *Noyes v. Humphreys*, 11 Grattan (Virginia), 636; *Walker v. Richards*, 41 New Hampshire, 388; and *Scudder v. Wade*, 1 Southard (New Jersey), 249. Of the last three cases, *Noyes v. Humphreys* and *Walker v. Richards*, are on the first branch of the proposition (the latter

§ 193. We have already given our reasons for the opinion, that in all cases where the words used are such, as to

is abstracted, ante, § 177); and with respect to the second branch, we think that *Scudder v. Wade* holds the other way; for in both the opinions delivered in the case, the charges in the plaintiff's books against the defendant, were regarded as proper evidence in his favor, that the credit was given to the defendant, and not to the third person. It is true that the reporter appends a note, saying that the judgment was ultimately reversed by the Court of Appeals, but he was not able to ascertain on what ground the reversal proceeded; it could not have been on account of the admission of the books, as the report states that they were admitted without objection. In *Keith v. Kibbe*, 64 Massachusetts (10 Cushing), 35, the plaintiffs sued for the value of timber used in a dwelling-house, which was in the course of erection for the defendant; and the defendant admitted the delivery, (to whom the report does not state, probably only on the premises,) but contended that it was sold to one Rollins, the contractor for the erection of the dwelling. The plaintiffs were allowed to prove by their clerk, entries in their books, made by him, charging the timber to the defendant; notwithstanding the latter's objection that it was "incompetent evidence of the fact to whom credit was originally given;" and the plaintiffs having had a verdict, the judgment was reversed, on an exception taken to the admission of the evidence. The court said that it was a mere question as to the party, who was the debtor to the plaintiffs for the articles; and that in the case upon which the plaintiffs relied, *Ball v. Gates*, 53 Massachusetts (12 Metcalf), 491, there was other evidence relied upon to charge the defendant as debtor; and the book was offered to show merely the items delivered. The case, it will be seen, turned entirely upon the competency of entries of that character, under local usage or special statute relating to that kind of evidence; no question having arisen under the statute of frauds, doubtless, because no express promise was made either by the defendant or by Rollins, it being conceded that if one was liable, the other was not. It appears to the writer, that this and the numerous kindred cases relating to the general competency of entries of that character, with or without the plaintiff's suppletory oath, have no application to the question which we are now considering; for the reason that in those cases the issue is, whether the defendant did make the promise, while in cases under the statute the issue is, in what manner did the plaintiff accept it. But the reader who wishes to examine the decisions referred to, will find them collected, and very ably commented upon, in Messrs. Wallace's note to *Price v. The Earl of Torrington*, 1 Smith's Leading Cases, 390, page 515 and onward of the sixth American edition; where, with other interesting matter, it is shown that legal lexicography is sufficiently elastic to include, among the definitions of the word book, a shingle, a notched stick, a bit of paper two inches square, and a closet door.

be consistent with either an original or a collateral engagement, the question of fact is simply in what sense the promisee accepted them ; and that the determination of this issue necessarily involves an inquiry into the operation of his mind.(d) If this opinion is correct, it is difficult to see upon what ground his act, of so unequivocal a character as a cotemporaneous entry in his books to the debit of the promisor, can be excluded as part of the *res gesta*. With respect to the presentation of a bill to the promisor, or other similar act occurring after the completion of the transaction, there may be more room for doubt whether the evidence is admissible. Standing alone, it would perhaps be incompetent ; but cases may readily be suggested, where it would be so connected with the other facts of the case, as to require the application of the principle upon which cotemporaneous entries should be admissible. Evidence of this kind, on the part of the promisee, or his representative, has been received and regarded as material in some of the cases cited in the preceding pages ;(e) although in *Darnell v. Pratt*, and *Rains v. Storry*,(f) it appears to have been produced, merely for the purpose of laying the foundation, for proof of an admission of liability by the defendant.

(d) See ante, §§ 148, 149.

(e) See ante, §§ 158, 159, 160, 168, 169 ; and see also *Booker v. Tally*, 2 *Humphreys*, 308 ; *McCaffil v. Radcliff*, 3 *Robertson*, 445 ; *Scudder v. Wade*, 1 *Southard*, 249 ; and *Hodges v. Hall*, 29 *Vermont*, 209.

(f) §§ 158, 159.

CHAPTER SEVENTH.

THE SAME SUBJECT CONTINUED. — APPLICATION OF THE THIRD RULE TO CASES, WHERE THE PROMISE IN TERMS CONTEMPLATED A RESORT BY THE PROMISEE TO THE THIRD PERSON.

§ 194. It will be apparent, from what has gone before, that the question to whom credit was given will rarely arise, except when the words used by the promisor, imported a direct and absolute engagement to respond for the consideration. For the theory that the third person was, in the eye of the law, merely the conduit through which the consideration passed from the promisee to the promisor, is generally inconsistent with the making or acceptance of a promise, in terms conditional upon his default in paying the price. Still this rule admits of some exceptions; which, together with the principles by which the absolute or conditional character of the promise is determined, will be considered in this chapter.

ARTICLE I.

Where the promisor's liability was expressly made conditional upon non-payment by the third person.

(1) *Where the promise was to pay if the third person did not.*

§ 195. All the cases agree, that where the third person was a party to the transaction, and the promisor requested the promisee to let him have the property, or other consideration of the promise, and added, "I will pay, if he does not," or words to that effect, the promise is within the statute, as matter of law. It was so held in *Birkmyr v. Darnell*, and again in *Jones v. Cooper*, explained and affirmed, in that particular, by *Peckham v. Faria*; (a) and

(a) Ante, §§ 143, 144, 145.

these cases have so settled the rule, that but few others are found, where the point has been presented for adjudication; although those words are frequently referred to in text books and judicial opinions, as affording a perfect example of a conditional promise. One of the more recent cases, where they were indirectly in question, is *Conolly v. Kettlewell*, 1 Gill (Maryland), 260, A. D. 1843. There the action was to recover for goods delivered to one Sterling. After the goods were selected, and debited to Sterling in the day-book, the plaintiffs refused to deliver them till the defendant promised to pay for them, if Sterling did not; when they were delivered, and a memorandum added to the debit charge, that it was "secured" by the defendant. The plaintiff having had a verdict and judgment, it was held on appeal, that the promise was collateral as matter of law; and the judgment was reversed in the Court of Appeals. And a like ruling was made in *Steele v. Towle*, 28 Vermont, 771, A. D. 1856, respecting the words, "he is good; if not, I am," spoken by the defendant while negotiating, in behalf of a third person, with the plaintiff. (b)

§ 196. But while a promise, framed in these or equivalent words, imports in law a conditional undertaking, the presumption may be overcome by the circumstances of the case. It is believed, however, that these must be of such a character as to show that the third person was not a party to the contract. This subject will be more fully considered, together with some other descriptions of conditional contracts, which are nevertheless regarded as original, in a subsequent portion of this chapter.

(2) *Where the promise was to see the promisee paid, or words to that effect.*

§ 197. The form of conditional promise which occurs in the cases, more frequently than any other, is where the promisor requests the promisee to deliver to the third per-

(b) See also *Blank v. Dreher*, 25 Illinois, 331; *Stone v. Walker*, 79 Massachusetts (13 Gray), 613; *Dufolt v. Gorman*, 1 Minnesota, 301; *Skinner v. Conant*, 2 Vermont, 453; *Sinclair v. Richardson*, 12 Vermont, 33.

son the subject of the contract, and adds, "I will see you paid," or "I will see the bill paid," or similar words. The course of decisions respecting this form of expression has been very singular, for in the earliest case of all, *Watkins v. Perkins*,^(c) A. D. 1697, Holt, C. J., puts this precise formula as the best illustration of a promise collateral as matter of law, whereas in the next case, *Birkmyr v. Darnell*,^(d) it is used as containing the words in which an original promise can be most fitly couched. Lord Mansfield also regarded the expression as indicating an original promise, as appears from his ruling in the next succeeding case, *Mawbrey v. Cunningham*, as explained in *Jones v. Cooper*,^(e) Again, in *Thompson v. Bond*,^(f) Lord Ellenborough, coinciding with Holt, said that such a promise is collateral as matter of law. In several other cases, English and American, among them *Keate v. Temple* and *Matson v. Wharam*,^(g) the same expression, either alone, or in connection with others, has been treated sometimes as importing an original, and sometimes a collateral engagement, according to the other circumstances in evidence; without adverting to the question, in which capacity the words *prima facie* import that the engagement was made. But in modern times, especially in the United States, the rule seems to be well established that these words, or their equivalents, imply a collateral promise as matter of law; and in the absence of proof of a contrary intent, they will not suffice to maintain an action. Thus in *Thwaits v. Curl*, 6 B. Monroe (Kentucky), 472, A. D. 1846, a case, however, which involved the validity of a verbal promise to pay another's precedent debt, Ewing, C. J., delivering the opinion of the court, said, "The language that she would see him paid, shows that the promise was a collateral undertaking to answer for or see paid the debt of another; not an independent promise. To see paid imports an undertaking or

^(c) Antr § 142.^(d) Ante, § 143.^(e) Ante, § 144.^(f) Ante, § 157.^(g) Ante, §§ 155, 146.

guaranty for another's debt." So in *Elder v. Warfield*, 7 Harris and Johnson (Maryland), 391, A. D. 1826, Buchanan, C. J., remarked that this expression imports a collateral promise.

§ 198. The rule that these words imply prima facie a collateral undertaking, was embodied in the decision of *Cropper v. Pittman*, 13 Maryland, 190, A. D. 1858. There the action was to recover for goods furnished to John S. Cropper, the brother of the defendant and appellant; and the proof at the trial was, that the defendant introduced his brother to the plaintiff's salesman, as a person who wished to purchase a bill of goods, and said "that he" (the defendant) "would see the bill paid." After this conversation, John S. Cropper selected some goods; but before they were delivered, the salesman called again upon the defendant, and asked if he would accept a draft for the amount, which the defendant declined to do; but he said that he would see the bill paid, as he expected some consignments from his brother "and he would appropriate the amount to pay the bill; he said he would see the bill paid, if John S. Cropper purchased the goods of the plaintiff." The goods were thereupon delivered, and the report says that "at subsequent periods the defendant gave witness orders for goods for his brother John S. Cropper; that the goods were all charged upon the plaintiff's books to John S. Cropper." The judge instructed the jury, that if the goods were sold on the credit of the defendant, the plaintiff was entitled to recover; and he refused to instruct them, as requested by the defendant, that if the agreement was to pay a debt contracted by John S. Cropper, if he did not, the plaintiff was not entitled to recover. The plaintiff had a verdict, and the judgment thereon was reversed by the Court of Appeals, Tuck, J., delivering the opinion. He said that John S. Cropper was liable for the goods, and the plaintiff considered him as a debtor for them, and that sometimes there may be a question to whom the credit was given, depending upon inferences to be drawn from all the facts and circumstances, but when the evidence is

not legally sufficient to charge the defendant, the parties should not be sent to a jury. The learned judge added, that, in this case, there was no error in the refusal of the defendant's prayer, because it assumed that the debt was contracted by John S. Cropper; when the question was, whether it was the defendant's original debt. But he thought that the instruction actually given was erroneous, for certain reasons assigned by him, and chiefly, because it was left to the jury to decide, whether the goods were sold upon the credit of the defendant, when the evidence was not legally sufficient to warrant such a finding. He proceeded: "We do not say that in every case, where the words 'I will see the bill paid' are used, they necessarily import a collateral undertaking, and that in no such case could the plaintiff recover; but that when they stand alone, as here, they must be so interpreted. If accompanied by other words or facts, sufficient to authorize a jury to find from all the evidence, that credit was given to the party using them, a different result might follow."

§ 199. So in *Kinloch v. Brown*, 1 Richardson (South Carolina), 223, A. D. 1845, the defendant had authorized one Hieronymus, "to go to the plaintiffs to purchase hay and corn," or, as the witness at another time expressed himself, had "proffered his services as security;" and H. had purchased the hay and corn accordingly, saying to one of the plaintiffs at the time, that the defendant "was to be security, and would see him paid." It appeared that the plaintiffs charged the goods to the defendant, and that the defendant knew that H.'s credit with the plaintiffs had been stopped. Nevertheless the plaintiffs were nonsuited, and on appeal the judgment was affirmed, the Court of Appeals holding that the contract, as entered into between the plaintiffs and H. as the defendant's agent, was conditional by its terms, the meaning of the words used by H. being in substance, that the defendant would pay if H. did not.(h)

(h) An extract from the opinion in this case will be found in § 191, ante. It is to be remarked, however, that here the word "security" was used,

§ 200. The promise proved in the following case has precisely the same meaning, with respect to the performance of some act other than the payment of money, as an undertaking to see the promisee paid, where the payment of money is

so that the case is not as direct an authority as *Cropper v. Pittman*, for holding that a promise to see the promisee paid is necessarily collateral. Of the effect of the word "security," or its equivalent, "guaranty," it may be said that the use of either will generally be sufficient of itself to stamp the contract as collateral. *Everett v. Morrison*, Breese (Illinois), 49. See also, *Allen v. Scarff*, 1 Hilton (N. Y.), 209; *Bronson v. Stroud*, 2 McMullan (South Carolina), 372, post § 211. See also, *Conolly v. Kettlewell*, 1 Gill 260, ante § 195; as to the effect of the entry "secured by" in the books of the promisee, as descriptive of the contract of the promisor. It was held in *Norris v. Spencer*, 18 Maine, 324, that the word "security" was not necessarily equivalent to "guaranty," but, on the contrary, was equivalent to "surety," unless a contrary intent appeared; so that a joint action could be maintained, where a contract in writing had been executed by one of the defendants, whereby he undertook as "security" for the fulfilment by the other of another contract, signed by the latter, and written on the same paper. This decision was made upon the authority of *Hunt v. Adams*, 5 Massachusetts, 358, where it was held, that an instrument signed by the defendant alone, and appended to another person's non-negotiable note, whereby the defendant undertook as surety for the payment of the note, was not a promise to answer for the debt of another, within the statute of frauds, because both were joint and several promisors. But a different rule was laid down in *Gould v. Moring*, 28 Barbour, 444, decided by the New York Supreme Court in 1858. There the instrument, upon which the action was brought, consisted of a short tenant's agreement, of the form in common use, executed by one Heilberth to one Andrews, the plaintiff's assignor, whereby Heilberth certified that he had leased from Andrews a certain office at a specified rent, payable as therein mentioned, and under the signature of Heilberth to that paper, the defendant had written "security, H. E. Moring." The plaintiff recovered at the trial, but the judgment was reversed upon appeal, and a new trial ordered, *Davies J.* saying: "In this case, the defendant undertakes, as security for the tenant, that is, that he will pay if the tenant does not. A joint action will not lie against them both; they are not the same, but different contracts." Hence, as the defendant's contract, comprised as it was in the single word "security," did not express the consideration, as the New York statute then required, it was held to be void. But when no person is bound except the promisor, the words "secure" and "security" will be regarded as equivalent to "pay" and "payment." Thus in *Adams v. Hill*, 15 Maine, 215, A. D. 1839, where the action was on a written contract made by the defendants, agreeing to

in question. In *Billingsley v. Dempewolf*, 11 Indiana, 414, A. D. 1858, it appeared in evidence that one Allen, wishing to procure the loan of a horse from the plaintiff, so informed the defendant in the presence of the plaintiff, and added, "that the plaintiff wanted security for the return of the horse." The defendant answered, "Any agreement you and Billingsley make about the horse, I will make good." The plaintiff thereupon delivered the horse to Allen, to be returned in about three weeks. The cause was tried by the court without a jury, and judgment was given for the defendant. Upon appeal the Supreme Court affirmed the judgment; holding, that although there was no conflicting evidence, the question was one of fact to whom credit was given; and the decision did not appear to be so flagrantly wrong that it should be reversed upon the facts. The opinion concluded, however, as follows: "And we think, also, that the proper construction of the terms of the promise is, that it was but a collateral undertaking." This is manifestly the ground upon which the decision should have been exclusively placed: it being impossi-

"secure" to the plaintiff payment for certain work, to be done under another contract therein referred to; which, however, had not been executed so as to bind the parties thereto, it was held that the promise was original, the court saying, "The terms used are a direct promise to pay, for such is the effect of an agreement to secure payments which no other party was bound to make." And it sometimes happens that although words unequivocally descriptive of a collateral contract were used during the negotiations, the contract itself was consummated by words importing an absolute engagement. Thus in *Pennell v. Pentz*, 4 E. D. Smith, 639, ante § 170, the plaintiff in terms applied to the third person for a "guaranty for payment;" and the promisor, on being applied to, declined to "guaranty to pay" unless the third person assigned to him the paving contract, to fulfil which the goods were wanted; thus clearly showing that the parties contemplated, in the early stages of their negotiation, a mere collateral engagement. But nevertheless the promise was held to be absolute, because, on the completion of the transaction by the assignment of the contract, the promisor said, "I will pay, as no other person can draw the money," which expression clearly showed that he agreed to provide for the payment, without any resort to the third person.

ble to infer an original undertaking from the defendant's language. (i)

ARTICLE II

Where the promise is collateral, because its language implied that the third person was also to become liable.

(1) *Miscellaneous cases, depending upon the use of particular words.*

§ 201. There are a very few cases, turning in part upon the etymological construction of the words used by the promisor, in describing the arrangement contemplated between the promisee and the third person; which, it is held, render the promise collateral as matter of law, because they necessarily imply, that the person benefited by the transaction was to assume a liability for the debt. In each of those which we have at hand, there was also some expression used relating to the promisor's own engagement, which had its weight in determining the construction put upon the promise; but as the court distinctly held that the construction of the words, relating to the third person's engagement, was such as to render the promise necessarily collateral, the cases seem to form a separate class, turning upon that distinction.

§ 202. Thus in *Skinner v. Conant*, 2 Vermont, 453, A. D. 1830, it appeared that one Andrus was working the

(i) Cases where a contract had been previously entered into between the promisee and the third person, for the performance of services, the furnishing of chattels or the like, by the promisee, in some matter wherein the promisor was interested, for a price to be paid by the third person; and the promisee, being unwilling to fulfil his contract with the third person, was induced to proceed by the promisor's verbal undertaking to respond; depend upon a principle so closely allied to the first rule, that they are frequently regarded as belonging to the class now under consideration. In those cases the promise is not within the statute, if the promisee entirely abandoned his contract with the third person; and the inquiry whether he did so, raises generally many of the same incidental questions, respecting the person to whom credit was given, the terms of the promise, &c., which are presented in this class of cases. Several of those cases will be found to involve the very question just examined; the reader is therefore referred to the third article of the ninth chapter, where they are collected.

distillery of Skinner and Bulkely, the defendants in the court below, and plaintiffs in error in the Supreme Court, who "agreed, that in case Andrus would hire Conant" (the plaintiff in the court below) "to work in said distillery, they would see him paid;" that this agreement was verbal; that Andrus did hire him, and that he worked the number of days charged; and this action was brought to recover for his labor. The plaintiff had judgment in the court below, and upon error the Supreme Court reversed the judgment, Hutchinson, J., saying: "The agreement reported is to see Conant paid, if Andrus hired him, adding that Andrus did hire him. We can make nothing of this but a collateral agreement." "The allegation that Andrus hired Conant, imports that it was primarily Andrus's business to run the still of Skinner and Bulkely, in such a sense that he was debtor to Conant; and the contract of Skinner and Bulkely, that they would see him paid, means that they would pay him if Andrus did not."

§ 203. And in *Cutler v. Hinton*, 6 Randolph (Virginia), 509, A. D. 1828, the question arose upon a bill in equity, whether a promise made by Cutler, to pay for goods furnished by Hinton to one Love, was original or collateral. In commenting upon the testimony, while delivering the opinion of the court, to the effect that the promise was collateral, Carr, J., stated that the principal witness to the contract had given three versions of the language which was used, to wit: "that Cutler desired him to say to any other merchants that he would pay for any goods sold to Love;" that Cutler requested him to inform any persons "of whom Love might purchase goods, that he would pay for Love \$4,000," and the same respecting any persons "of whom Love might wish to purchase goods." The learned judge added: "Now, take either of these forms, and it seems to me that this is a collateral undertaking. He promises to pay *for Love* to any person that Love *might purchase* or *wish to purchase* goods of. Love then was to *purchase* the goods, which of course

would render him liable for them, and Cutler was to pay the money for Love, not for himself. Unless I have confounded things strangely, this is clearly collateral.”(a)

§ 204. The same word “purchase” was used in the promise construed to be collateral in *Cropper v. Pittman*, 13 Maryland, 190,(b) although the court seems to have confined its observations upon the words used, to the promise to see the plaintiffs paid.

§ 205. In *Walker v. Richards*, 41 New Hampshire, 388, A. D., 1860,(c) it was also held that the corresponding word “sold,” used in the description of the transaction between the promisee and the third person, imported that the latter had become liable to the former, and that the promise was consequently collateral. The plaintiff in that case was allowed to recover, only upon the common counts alleging a sale and delivery to the defendant; he having proved an original verbal promise to pay for goods delivered to the others. But the court held that the special counts called imperatively for a writing.

(2) *Where the promise was to become a party to a note or bill of exchange to be made by the third person.*

§ 206. The question under what circumstances a verbal promise to accept a bill of exchange is valid, belongs more properly to mercantile law. We have already seen that the liabilities, which the common law leaves to be regulated by that system, constitute a class of exceptions to the provisions of the statute of frauds;(d) and it is settled, independently of the statute, that a valid promise to accept is equivalent to an acceptance, and may be so treated, even in declaring.(e) While it is clear that a verbal acceptance of an existing bill is valid by

(a) See another extract from this opinion, ante, § 190.

(b) Ante, § 198.

(c) See the case fully abstracted, ante, § 177.

(d) Ante, chapter third.

(e) *Ontario Bank v. Worthington*, 12 Wendell (New York), 593.

the law merchant, there has been considerable doubt to what extent a verbal promise to accept a bill is binding. The case of *Pillans v. Van Mierop*, 3 Burrow, 1663, A. D. 1765, seems to have been generally regarded as authority for the proposition, that a verbal promise to accept a bill of exchange, thereafter to be drawn, is always equivalent to an acceptance; but, if this was the meaning of the decision, other cases, following soon afterwards, shook its authority; (f) and even before the Mercantile Law Amendment Act of 1856 (19 and 20 Victoria, chapter 97), the rule seems to have been settled in England, that a promise to accept a non-existing bill, although in writing, would not amount to an acceptance, even in favor of one who had discounted the bill on the faith of the promise. (g) In the United States, the weight of authority, in the absence of any statutory provision, is in favor of holding a promise to accept a bill, thereafter to be drawn, valid as an acceptance, only in the hands of a person who has taken it for value on the faith of the promise. (h) But in cases where the mercantile law applies, these questions are now regulated by special statute in England, and in most, and probably all of the United States. In other cases, the validity of a verbal promise to accept a draft or order, is generally governed by the rules applicable to other verbal promises. But sometimes it is evidence of a fund in the hands of the promisor with which to pay the debt; and then questions are presented which will be treated at length in a subsequent portion of this volume.

§ 207. The point, whether a verbal promise to accept a bill to be thereafter drawn in payment of the debt of a

(f) *Pierson v. Dunlop*, 2 Cowper, 571, A. D. 1777; *Mason v. Hunt*, 1 Douglas, 297, A. D. 1779; *Johnson v. Collings*, 1 East, 98, A. D. 1800; *Clarke v. Cock*, 4 East, 57, A. D. 1803.

(g) *Bank of Ireland v. Archer*, 11 Meeson and Welsby, 383, A. D. 1843.

(h) *McEvers v. Mason*, 10 Johnson (New York), 207; *Goodrich v. Gordon*, 15 Johnson, 6; *Coolidge v. Payson*, 2 Wheaton (United States), 66; and see 1 Parsons on Notes and Bills, pp. 292-294, and numerous authorities collected in the notes.

third person, is within the statute of frauds, was decided in a recent American case, *Wakefield v. Greenhood*, 29 California, 597, A. D. 1866. There the action was brought by a teamster, against a forwarding and commission merchant at Sacramento, who had employed the plaintiff to transport certain goods of one Bar, from Sacramento to Austin, upon a verbal promise to pay any order or draft which Bar might draw on the defendant for the transportation of the goods. The complaint, after setting forth the contract, and its fulfilment by the plaintiff, stated that the plaintiff and Bar had an accounting for the transportation, upon which there was found to be due from Bar to the plaintiff one thousand dollars; and that Bar made a draft for that sum upon the defendant, which the plaintiff accepted in payment of the amount so due to him from Bar; but the defendant refused to pay it, etc. Upon this complaint, and the evidence in the cause, the Supreme Court reversed a judgment for the plaintiff. In the opinion it is said, that if by the agreement, the defendant had assumed a direct liability for the cost of the transportation, leaving the amount to be agreed upon between the plaintiff and Bar, and to be evidenced by Bar's draft upon the defendant, the promise would have been clear of the statute; but that such is not the case made by the pleadings or by the evidence. On the contrary, the complaint expressly states that Bar became indebted to the plaintiff, and the draft was given to pay that debt; which is entirely inconsistent with the idea that the service was performed at the request of the defendant, and upon his direct promise to pay; and further, that the promise was not to pay for the transportation, but to pay any draft which Bar might make therefor on account of his indebtedness to the plaintiff; the allegations of the complaint being further borne out by the evidence, which shows that the draft was to be paid by the defendant on account of Bar.(1)

(1) See *Taylor v. Hilary*, in note to § 210.

§ 208. A few cases are appended in the note, where a verbal promise to accept a third person's draft or order was held to be void, the circumstances not being such as to sustain the promise as an acceptance within the mercantile law, or the special statutes relating to that subject.(j)

§ 209. The question whether the statute applies to a verbal promise to indorse the bill or note of the third person, or to join with him in the execution of a promissory note, where the consideration moves to him, although not complicated by the same considerations which have caused so much doubt in the case of a promise to accept his bill, has been subjected to embarrassments of a different kind, growing out of some English decisions, which have already been commented upon at length.(k) The leading American case on this subject, is *Carville v. Crane*, 5 Hill, 483, decided in the New York Supreme Court, A. D. 1843. There the declaration stated in substance, that in consideration that the plaintiff would sell to the firm of G. B. & J. L. Crane, certain goods upon credit at a specified price, the defendant promised the plaintiff, without writing, that he would indorse the note of G. B. & J. L. Crane at six months, for the price of the goods; and it also averred a delivery of the goods and a refusal by the defendant to indorse such a note. The defendant demurred to the declaration; and after argument, judgment was given in his favor. Cowen, J., in delivering the opinion of the court, said that this is not analogous to a promise to accept a bill of exchange, because the acceptor is the principal debtor, and the drawer only a collateral undertaker, the acceptance being an admission of funds in the hands of the acceptor; and the cases do not say that a verbal promise to accept a bill

(j) *Wheatley v. Strobe*, 12 California, 92; *Luff v. Pope*, 5 Hill (New York), 413; *Loonie v. Hogan*, 9 New York (5 Selden), 435; *Ontario Bank v. Worthington*, 12 Wendell (New York), 593.

(k) *Jarmain v. Algar*, and *Bushell v. Beavan*, ante, §§ 113, 114.

for the accommodation of another is valid.^(l) But the indorser of a note is a collateral debtor, the maker being the principal; and if this were otherwise on the nature of an indorsement, the statement in the declaration shows that this was to be an accommodation indorsement for G. B. & J. L. Crane.

§ 210. "In other words," he proceeded, "it was a promise to become their surety for the debt. On fulfilling the promise by making and paying such an indorsement, the defendant might have recovered over against them as for money paid to their use. Their assent to the defendant's promise is perhaps to be intended; but whether so or not, the defendant finally joining them in the note implies their ultimate assent, that he would take the exact position of their surety. To say then, that this is not in effect a promise to answer their debt, would be a sacrifice of substance to sound. It would be devising a formulary by which, through the aid of a perjured witness, a creditor might get round and defraud" (defeat) "the statute. He may say, 'You did not promise to answer the debt due to me from A; but only to put yourself in such a position that I could compel you to pay it.' Pray, where is the difference, except in words? According to such reasoning, unless you recite the words of the statute in your undertaking, it will not reach the case. No legislative provision would be worth any thing upon such a construction." The learned judge then commented upon several of the cases cited by the counsel for the plaintiff, none of which, he contended, maintains any principle which would sustain this promise, except *Bushell v. Beavan*, which he said is not law, and *Jarmain v. Algar*, which is questioned. Judge Story's remarks in *D' Wolf v. Rabaud*,^(m) were also referred to, as to some extent sustaining the plaintiff's position; but it was said, that he admitted that

(l) But it was so said in *Maggs v. Ames*, 4 Bingham, 470, although that case seems to have been overlooked in the discussions of the question.

(m) Ante, § 185.

he was not following the construction of the statute, but suggesting what would be a better construction if it were *res nova*. (n)

(n) This case seems to have been decided in ignorance of the judgment of the Court of Exchequer, in a case presenting some points of close similarity; but which, although the reports are very confused, and in some respects conflicting, we think can be reconciled with it, and also with *Wakefield v. Greenwood*, 29 California, 597, ante, § 207. We refer to *Taylor v. Hilary*, 1 Crompton, Meeson and Roscoe, 741; 1 Gale, 22; 3 Dowling's Practice Cases, 461; and 5 Tyrwhitt, 373, A. D. 1835. The declaration (all the reports agree that there was only one count) stated, in substance, that the defendant had guaranteed the payment to the plaintiff, of the price of such goods, not exceeding 200*l*., as he should "allow one Henry Holt to have," and that the plaintiff did deliver the goods to Holt, who had not paid for them, etc. The defendant pleaded, that after the making of the promise, and before any breach thereof, it was "agreed, by and between the plaintiff and the defendant, that the plaintiff should supply to the said Henry Holt 200*l*. worth of goods, as he should want them, and that such goods should be paid for at the end of three months, by a joint bill at four months, accepted by the defendant;" and that this agreement was accepted by the plaintiff, before any breach of the former, in full discharge thereof. To this plea the plaintiff demurred specially, and the demurrer assigned for cause two grounds; one of which was that there was no difference between the new agreement and the old, except as to the time of credit given. Upon the argument, the plaintiff's counsel objected to the plea, that it did not state that the new agreement was in writing and signed, as required by the statute of frauds; and he contended, that although in declaring it was not necessary to state that an agreement within the statute was in writing, the rule was otherwise in pleading such an agreement. But Parke, B., said: "The first agreement was a guaranty; but according to the second agreement, the defendant became absolutely bound as an original debtor. In order to bring the case within the authority cited, it must be shown that the second agreement was a guaranty." There is no further reference to this particular question, the demurrer having been overruled upon the ground that the second agreement was a substituted contract, and an answer to an action upon the former; and that as the second plea did not amount to an accord and satisfaction, no averment of performance was necessary. From this statement it would appear, that the decision of the court was to the effect that an agreement by the defendant, to accept a bill to be drawn jointly by the plaintiff and Holt, in payment for goods to be supplied by the plaintiff to Holt, was not within the statute. This is undoubtedly correct, as Holt would not be liable, the defendant being, in legal effect, the purchaser of the goods; a fact which also disposes of any question arising under the mercantile law. But the plaintiff

§ 211. So also where the promise is to become the maker of a promissory note, jointly with the third person, as in *Bronson v. Stroud*, 2 McMullan (South Carolina), 372, decided A. D. 1842. There the plaintiff was applied to by one Henning to sell him some hogs, to which he replied that he must be made safe. Henning then applied to the defendant, who went to the plaintiff and said that he would be Henning's security, and requested him to let Henning have the hogs, specifying the number; but he said that he could not wait till they were weighed, and directed the plaintiff, when they should be weighed, to make the calculation and draw a note for the amount, have Henning sign it, and bring or send it to him, and he would sign it with Henning. The hogs were delivered, and a joint and several note, signed by Henning, was tendered to the defendant for his signature, but he refused to sign it. The case was submitted to the jury upon the usual charge to inquire to whom credit was given, and they found a verdict for the plaintiff; and upon appeal it was held, that upon the facts proved the promise was collateral as matter of law, and a nonsuit was ordered to be entered. In *Taylor v. Drake*, 4 Strobhart, 431, decided in the same court, A. D. 1850, the facts approached still nearer to those in *Carville v. Crane*. There one Mrs. Owens had

had leave to amend, and after amendment the cause was tried; and the special plea is stated, in the report of the trial of the cause, in 7 Carrington and Payne, 30, to have alleged that the second agreement was that there should be a "joint" bill accepted by the defendant *and Holt*; and it is there said that the defendant having proved this plea, but whether by writing or orally, is not mentioned, the plaintiff elected to be nonsuited. This would present the question in an entirely different phase; but notwithstanding that the report in Carrington and Payne implies, that the amendment consisted in withdrawing the demurrer and filing a replication; and a remark attributed to Baron Parke, in 5 Tyrwhitt, would indicate that the original plea alleged that some other person was to join with the defendant as acceptor; the probability is, that the plea was as stated in the reports of the argument; and that after the decision of the demurrer, the parties pleaded de novo, beginning with the declaration. If so the plea at the trial was not the one which had been adjudged to be without the statute, upon the argument of the demurrer; and for aught that appears, it was proved by a writing.

purchased from the plaintiffs goods on credit at an auction sale, and she was entered as the purchaser on the plaintiffs' books; the defendant was present, advising and assisting her; it was affirmatively proved that she had no credit; the plaintiffs refused to deliver the goods, unless the defendant would indorse her note for the amount, which he verbally agreed to do; and the goods were thereupon delivered to her. The court set aside a verdict for the plaintiff and ordered a nonsuit to be entered.

§ 212. The same principle has been established in England by the recent case of *Mallett v. Bateman*, 35 Law Journal, N. S., Common Pleas, 40, decided A. D. 1865. (o) There the plaintiff had entered into a contract to supply the firm of Calvert & Co. with iron plates, to be used in constructing a railway bridge. By the contract, payment was to be made half in cash and half in bills; but, after part of the goods had been delivered, the payments not having been regularly made, the plaintiff threatened to keep back the remainder of the plates, unless the defendant would protect the plaintiff against loss on the bills, for which he would allow him a discount of three per cent. The defendant, who was interested in the work in which Calvert & Co. were using the plates, assented to this, and verbally agreed that he would take their bills from the plaintiff, at three per cent discount, for the amount of all future invoices; and on the plaintiff proposing to indorse the bills without recourse, the defendant objected to his doing so, and agreed to give him "such document, if he should simply indorse Calvert's bill, as should, under legal advice, free him from all suspicion of risk." Thereupon the plaintiff forwarded the remainder of the plates, according to the contract, and received from Calvert & Co. an acceptance of a bill for the amount of the invoices;

(o) S. C. 13 Law Times, N. S., 410; 1 Law Reports, Common Pleas, 163; 12 Jurist, N. S., 122; 14 Weekly Reporter, 225; and 1 Harrison and Rutherford. 109. Also reported in the court below, 10 Law Times, N. S., 869; 33 Law Journal, N. S., C. P., 243; 10 Jurist, N. S., 865; and 16 Common Bench, N. S., 530.

but, before the same had been presented to the defendant to be cashed, Calvert & Co. failed, and the defendant then refused to cash it. In an action in the Common Pleas upon this promise, the plaintiff had a verdict; whereupon the defendant obtained a rule nisi to set aside the verdict, which, after argument was made absolute. From this decision the plaintiff appealed to the Exchequer Chamber, where the judgment below was affirmed.

§ 213. Pollock, C. B., delivering the unanimous opinion of the Exchequer Chamber, said that the real question was, "whether a contract to give a guaranty does not require to be in writing, as much as a guaranty itself;" he then referred to the decisions of the courts under the statute of uses, as having practically nullified that statute, and added: "I hope we shall avoid falling into a similar error in construing the statute of frauds. The contract here is substantially a contract, that if the buyer of the goods does not pay the plaintiff for them, the defendant will, in consideration of a discount of 3*l.* per cent, undertake that the plaintiff shall not suffer; for the defendant undertakes to hold the bill without having recourse to the plaintiff. It is an agreement by which the buyer is not to be exonerated, and by which the defendant engages to indemnify the seller against the buyer's default. That is within the statute; and therefore the judgment of the court below ought to be affirmed."(*p*)

§ 214. But in all these cases the consideration of the promise enured to the benefit of the third person, and he was substantially, as well as formally, the principal debtor. Where however the third person was only formally the principal debtor, the real principal, as between the parties to the promise, being the promisor,

(*p*) See also *Emmet v. Dewhurst*, 15 Jurist, 1115, and 3 Macnaghten & Gordon, 587, cited post § 342. The distinction between the case in the text and *Bushell v. Beavan*, ante, § 114, would appear to turn entirely upon the fact, that in the latter case the defendant undertook that another person should execute a guaranty.

the rule is otherwise. In that case the promise is not within the statute; this being one application of a principle, which may be said to govern or qualify nearly every rule, by which the application of the statute is determined; namely, that he who is substantially the primary debtor, shall not be allowed to escape from the fulfilment of his promise to pay his own debt, because he has put it in the form of a promise to pay the debt of another.

§ 215. Thus in *Westcott v. Keeler*, 4 Bosworth (New York), 564, decided A. D. 1859, the plaintiff sued as assignee of one S. H. Mattison, setting forth specially in his complaint, the facts upon which he founded his right to recover, which appeared, upon the trial, as far as they involve this question, to be substantially as follows. Mattison had loaned the defendant \$3000, upon a note of one Rumsey for that amount, indorsed by the defendant. On the day when the note matured, the defendant and Mattison agreed verbally, that Mattison would surrender the note to Rumsey, and procure from him a new note of the same amount in renewal thereof, which he would bring to the defendant, and the defendant would then indorse it; pursuant to that agreement, Mattison surrendered the maturing note to Rumsey, who gave him a new note on demand for the same amount, payable to the order of himself (Rumsey), and by him indorsed; which was immediately taken by Mattison to the defendant, who refused to indorse it after Rumsey, as Mattison requested him to do, saying that Rumsey would pay it in a few days. Subsequently Rumsey, from time to time, made payments to Mattison upon the note; but finally Mattison sued him upon the note, and recovered judgment, and this action was brought for the unpaid balance. The plaintiff was nonsuited at the trial, on several grounds; one of which was that the promise to indorse Rumsey's note was void by the statute of frauds; and on appeal the defendant's counsel cited *Gallager v. Brunel*(q) and *Carville v.*

(q) Ante, § 110.

Crane, in support of his position, that the agreement was within the statute. But the judgment was reversed, *Hoffman, J.*, distinguishing those cases from the one at bar, on the ground that in the former "there was no original debt between the parties to the promise."

ARTICLE III.

Where a promise is not within the statute, although it was in terms conditional upon non-payment by a third person.

§ 216. It was said, at the beginning of this chapter, that a promise, conditional upon default in payment by a third person, generally leaves no room for the only theory, upon which absolute promises are held to be original, in other cases where third persons are concerned; namely, that the third person was not concurrently liable with the promisor. There are however a few cases, in which this theory can be reconciled with such a conditional promise, and in those the statute does not apply. In general terms, they may be said to include all cases, where the presumption of liability on the part of the third person, arising from the words used, can be overcome by proof that he did not incur any liability whatever; but for all practical purposes, they may be restricted to those where he was an entire stranger to the promise; for it is difficult to conceive a case, where the third person, (unless he was under a disability,) could be a consenting party to a promise of this character, without incurring any liability himself. This exception results from necessity; for where no one assumed any liability except the promisor, it would be an absurdity to say that his undertaking, whatever may be its form, is a promise to answer for the debt, default, or miscarriage of another; and unless it is binding upon him, the promisee will be wholly without remedy. (a)

(a) "If A promise B, that in consideration of his doing a particular act, C shall pay him such a sum, or that if C do not pay him such a sum, he (A) will pay the same, this is no collateral promise, unless C was privy to the contract and recognized himself as debtor also; but otherwise A is the sole debtor, and the statute is out of the case." *Roberts on Frauds*, 223.

§ 217. There is an early case upon this subject, *Masters v. Marriott*, 3 Levinz, 363, decided in 1694; where, although the statute of frauds was not directly brought in question (probably because the promise was in writing), the same point was presented upon the pleadings, which raised the precise question whether the promise was original or collateral. There the plaintiff declared in assumpsit, that the defendant had sold him a certain gelding for eight guineas; that it was part of the agreement that, if the plaintiff did not like the gelding, and delivered it to one Barham for the defendant's use, Barham should repay the eight guineas, and, if Barham did not pay it, the defendant would repay it on request; that the plaintiff did not like the gelding, and delivered it to Barham, and requested him to pay the eight guineas, which he refused to do. There was another count for eight guineas, had and received to the plaintiff's use, and the declaration concluded with an averment that the defendant had not, although often requested, repaid the said sums, to the damage of the plaintiff, 30*l*. On non-assumpsit pleaded, a verdict was given for the plaintiff, *with entire damages*; and it was moved in arrest of judgment, and argued several times, that the promise to repay the eight guineas if Barham did not do it, was a collateral promise to pay in default of another, and that the defendant was not a debtor, but only a surety in default of Barham; consequently, that a special request to the defendant ought to have been averred, and the general request was insufficient; and further, that there should have been a notice that Barham had not paid, and a special request thereupon; and the damages being entire on both counts, it was contended that the plaintiff could not have judgment. But at last it was resolved by the whole court, that this was not a collateral contract to pay a debt for another, but the whole was one entire contract upon the sale, which was void and at an end, when the condition was performed, by dislike of the gelding and returning it to Barham; so that the money was then in the defendant's hands to the plaintiff's use, and Barham was only the defendant's ser-

vant, to receive the gelding and repay the money; and by the not doing whereof, the defendant, as master, was the debtor. Judgment was thereupon given for the plaintiff upon the whole declaration, and affirmed in error.

§ 218. In *Gordon v. Martin*, Fitzgibbon, 302, decided A. D. 1732, a similar question also arose upon the pleadings. There the plaintiff declared in indebitatus assumpsit, for work and labor done by the plaintiff, at the special instance and request of the defendant; and at the trial the proof was, that the services were performed touching the sale of an estate, for which one L. S. was treating with the defendant's brother; and the defendant's promise was contained in a letter written by him, in the following words: "If L. S. shall go through the purchase, my brother will give you a handsome gratuity for the trouble and pains you shall be at in transacting that affair, which I promise and assure you shall not be less than 300%. My meaning is, you shall be paid when the conveyances shall be executed." And the question, whether the evidence maintained the declaration, was saved for the opinion of the court. The plaintiff had judgment upon his motion, the whole court holding that the work and labor "was at his request and upon his credit;" and that where a special agreement has been performed, a general indebitatus assumpsit will lie. And, upon the first of these points, Mr. Justice Lee said that "there was a difference between a conditional and an absolute undertaking; as if A promise to pay B such a sum if C does not, there A is but a security for C; but if A promise that C will pay such a sum, A is the principal debtor, for the act was done upon his credit, and no way upon C."

§ 219. These two early cases are frequently referred to in the books, upon the point now under consideration; and, although the statute was not brought directly in question in either, they illustrate very fairly two varieties of this species of contract to which it does not apply. In the one, the third person was brought in as the mere

servant of the promisor, through whom the latter agreed to fulfil his own engagement to respond, made upon a consideration moving entirely to himself; in the other, the third person apparently received the entire benefit of the consideration, and the defendant's promise was held to be original, solely because the services did not appear to have been rendered at the request of the third person, so as to raise an implied assumpsit on his part to pay for them. The former is the case where the question most commonly arises, and is most easily disposed of; for in the latter, the presumption of a request from the acceptance of the benefit conferred, is generally so strong, that very slight proof will suffice to establish the third person's liability. Still, wherever it fairly appears from the evidence, that the service was rendered to the third person, without his express or implied request, he is not liable, whatever may have been the benefit which he may have derived therefrom; and in all such cases a conditional promise is without the statute. (b)

(b) Thus in *Dunbar v. Williams*, 10 Johnson (New York), 249, it was held that a physician could not recover for services rendered, and medicine furnished, to the defendant's slave, in curing him of a disease, upon the application of the slave, and without the defendant's request. And in *Bartholomew v. Jackson*, 20 Johnson, 28, the plaintiff was not allowed to recover for his services in removing the defendant's wheat, to preserve it from being consumed by fire, but without the knowledge or privity of the defendant. So also, in *Ingraham v. Gilbert*, 20 Barbour (New York), 151, the same rule was applied where the plaintiff had paid a debt of the defendant due to a third person, and there was no proof of a prior request; although it was shown that the defendant had subsequently admitted his liability. So in *Willis v. Hobson*, 37 Maine, 403, where the plaintiffs, on the last day of grace, and a few minutes before the close of business, had indorsed the defendant's note, lying in the bank where it was payable, and the next day had paid it; it appearing that the indorsement was made because it was not convenient to pay the money at the moment, and to save it from being protested; and that both the indorsement and payment were made at the request of a person, to whom the defendant had intrusted the money to pay the note, but who had misappropriated it. And in *Adams v. Hill*, 15 Maine, 215, ante, § 199 note, it was held that the contract was original, and upon sufficient consideration, inasmuch as the corporation was not bound by it. See also *Richardson v. Williams*, 49 Maine, 558, and *Ellison v. Wischart*, 29 Indiana, 32, cited hereafter, where questions arose in this connection under the statute of frauds.

§ 220. A remarkable case, where a conditional promise was held to be original, under circumstances where it would appear, at first sight, that these principles called for a contrary decision, is reported under the title of *Blodgett v. The Town of Lowell*, 33 Vermont, 174, A. D. 1860. There one Guindon, a poor person, had been injured by an accident, and was conveyed to the house of the plaintiff, "a very infirm old man, who objected in vain to his being left with him, and who applied immediately to the overseer of the poor of the town of Lowell to support him;" the overseer, in his official capacity, told the plaintiff to take good care of him, and if Guindon did not pay the plaintiff, he, the overseer, would see that the plaintiff had his pay. It was shown that Guindon had some trifling property; but the court decided that he was a pauper within the meaning of the statute on that subject, and chargeable to the town of Lowell. A judgment in favor of the plaintiff was affirmed, the Supreme Court holding that the promise was original and not within the statute of frauds; and that the town was liable to the plaintiff for the support of the pauper, furnished upon the faith of the overseer's promise. The opinion conceded that in an ordinary case, such a promise would be in terms collateral; "but," it was said, "the peculiar circumstances of this transaction clearly take it out of the general rule, and forbid the idea of any such intention."

§ 221. The reasons assigned for holding the promise to be original, were, 1, that the person injured was a pauper whom nobody would credit; 2, that the application to the town showed that the plaintiff would not rely upon him for payment; 3, that he was legally chargeable to the town, which was primarily liable; and 4, that there was no proof of any contract with the pauper himself. It is evident that the third of the reasons assigned by the court is the pivot upon which the whole case turned; the other three are important only as far as they bring out the force of this central idea; for standing alone, they would fit almost every case as well as this. The opinion distinctly

states that under the statute of Vermont, the notice given by the plaintiff was sufficient, to throw the pauper's support absolutely upon the town. If therefore the town was absolutely and primarily liable, the condition that the plaintiff should call upon the pauper in the first place for payment, may be regarded, not as a qualification of liability, but as a condition inserted by the absolute promisor, merely for his own convenience; the person upon whom the plaintiff was in the first place to call, not being a debtor or a party to the contract, but the mere servant of the promisor, *pro hac vice*, precisely as Barham was in *Masters v. Marriott*.

§ 222. As a contrast to the last case, we give an abstract of one where a conditional promise was held to be collateral, notwithstanding that the third person was not liable at the time it was made; but the case can be made to harmonize with the others on this subject, although some of the remarks of the court may be open to criticism. In *Blank v. Dreher*, 25 Illinois, 331, decided A. D. 1861, the defendant (appellant) had received an order from one Cunningham, for a large quantity of brick, which he could not fill, and he carried the order to the plaintiffs; thereupon one of the latter went to inquire from another person as to Cunningham's responsibility, when the defendant said, "You need not inquire further; Cunningham says he will pay for them in thirty days; only send up the brick; they need them very badly; and if he don't pay for them in thirty days, I will be good for them." The plaintiff answered, "that will do," or "I am satisfied; I will send him the brick." The brick were delivered accordingly to Cunningham, and received by him, and the next day one of the plaintiffs called on Cunningham, who objected to the quality, but finally said that if one Miller accepted the brick, the plaintiffs would get their pay in thirty days. Miller came the next day and accepted the brick, "at the price at which they were billed;" and Cunningham credited the plaintiffs with the amount, to be paid in thirty days. The defendant's name

was not mentioned, in the conversation between the plaintiff and Cunningham. In an action upon the defendant's promise, the cause was tried by the court without a jury, and the plaintiff had judgment, which was reversed on appeal, because it appeared that Cunningham was liable; the court saying, "whether an undertaking is original, or collateral merely, is to be determined, not from the particular words used, but from all the circumstances attending the transaction. Both the terms of the contract, and the circumstances of the transaction show to our minds quite conclusively, that Blank's undertaking was collateral." The opinion added, that the brick were bought by Blank for Cunningham, as the sellers knew; and it concluded by saying, that "Cunningham was liable the moment the brick were delivered to him." (c)

§ 223. On the other hand, in *Mease v. Wagner*, 1 McCord (South Carolina), 395, A. D. 1821, the promisor was a mere volunteer, whose authority was not afterwards recognized. There the defendant, before any thing was furnished, had undertaken to be responsible to the plaintiff for the funeral expenses of the widow of a Doctor Bradley, saying, "charge them to the estate of Dr. Bradley, and as soon as his nephew comes to town, he will pay for them, or I will." It appeared that the defendant was merely a friend of the family; that Dr. Bradley had left his property to his

(c) It is believed that the last proposition cannot be sustained, if the facts are correctly stated in the report. These indicate that Cunningham was no party to the original contract between the plaintiffs and the defendant; indeed it would prima facie appear that this transaction was merely a sale to the defendant, to enable him to fulfil Cunningham's order. But the latter became liable when he *accepted* the brick; and it is evident from what is said respecting Miller's acceptance, that they were accompanied with a bill which showed a sale from the plaintiffs to Cunningham. The legal construction of the transaction would seem to be, that the defendant assumed, without authority, to act as Cunningham's agent in ordering the brick; and the latter, by his subsequent ratification, waived the want of authority, and became liable *ab initio*. The defendant's undertaking was then clearly collateral; as the plaintiffs were concluded by their own act, from insisting that the sale was made to him.

widow for life, with remainder to his nephew ; but the widow had also a separate estate of her own. The nephew refused to pay the bill, and the plaintiff thereupon brought this action against the defendant upon her promise, and recovered. Upon a motion for a new trial, it was held that the defendant was liable, notwithstanding the statute, because she undertook for the representative of Doctor Bradley, against whom no action would lie for the funeral expenses ; but that if she had undertaken for the representative of Mrs. Bradley, who was legally bound to pay the funeral expenses, the rule would have been different.

§ 224. In most of the preceding cases, the promise was conditional by its terms, but in *Walker v. Norton*, 29 Vermont, 226, A. D. 1857, it was conditional only by implication ; but the same principle was applied. There the question was, whether the defendant was entitled to a set off against the demand of the plaintiff, arising upon the following facts. The defendant was one of the students in an academy, of which the plaintiff was the preceptor ; and at the request of the plaintiff, he assumed the expenses, and took charge of the preparations for an exhibition of the students, upon the plaintiff's promise that he should lose nothing, but be indemnified by the plaintiff for his services and expenses. It appeared that the exhibition was principally an affair of the students, and they, as well as the plaintiff, expected to meet the expenses connected with it, by a subscription which had been obtained for the purpose ; the defendant being one of the committee appointed by the students, to collect the subscriptions. The amount subscribed and the amount collected did not appear ; but it appeared that all of the subscription was not collected, and that the amount collected fell short of reimbursing the defendant, by the sum which he interposed as a set off. It was held that the defendant was entitled to the set off, the court saying : "But when no other person is liable for the same debt, the case is not within the statute, although the party may expect to obtain pay from some other fund which fails. As if a

teacher be hired to teach either a public or a private school, to be paid a certain price, if in one case the public money do not pay, or in the other the tuition do not pay ; this is an original, and not a collateral undertaking, although it is conditional in some sense. Such is the present case. The plaintiff was to pay what the subscription did not, and it is an original promise.”

§ 225. The case of *Ledlow v. Becton*, 36 Alabama, 596, A. D. 1860, presents another instance of a promise conditional by implication, which was sustained as original, for the same reasons which would have sustained it, had it been expressly made conditional. There the defendant was a widow, who, before administration of her husband's estate was granted, requested the plaintiff to let a man employed in the business of the estate have some goods, and promised that the estate would pay for them ; and they were furnished accordingly and charged to the estate upon the plaintiff's books ; but, as the bill of exceptions stated, “for convenience merely.” A bill of items, charging the goods to the estate, was also made out by the plaintiff, and presented to the administrator when he was subsequently appointed ; and he refused to pay it. The jury having found a verdict for the plaintiff, it was held, on error by the Supreme Court, that inasmuch as the estate was not liable for the goods, the widow's promise was not within the statute, and that she was accordingly liable for their value. So the judgment was affirmed. (d)

(d) See also chapter viii, article ii, for cases involving similar principles, and *Lane v. Burghart*, 6 Jurist, 126, cited in § 230.

CHAPTER EIGHTH.

THE SAME SUBJECT CONTINUED — CASES WHERE THE INTERPOSITION OF OTHER LEGAL PRINCIPLES HAS BEEN SUPPOSED TO CREATE EXCEPTIONS TO, OR QUALIFICATIONS OF THE THIRD RULE.

§ 226. Besides the cases abstracted or referred to in the preceding pages, where a doubt, respecting the result of a correct application of the third rule, arises upon some peculiarity of the case itself, or of the class to which it belongs, there are certain groups or classes, apparently governed by other legal principles conflicting with the rule, and raising questions whether they should not be excluded altogether from its operation. These will be examined in detail in the course of this chapter, for the purpose of ascertaining how far the rule admits of exceptions and qualifications.

ARTICLE I.

Where the person benefited by the transaction, and the person who came in aid of his credit, assumed a joint liability to the promisee.

§ 227. It is hardly necessary to say, that where the property, money, or labor, forming the consideration of the promise, is procured for the benefit of two or more promisors, in furtherance of an object in which they are jointly interested, they are regarded as one party to the contract; and although one of them may take the lead in the preliminary negotiations, and the consummation of the transaction, the promise of the others to respond is not a collateral undertaking for the debt of the first, but an original undertaking in their own behalf for their own debt, which is unaffected by the statute of frauds. Indeed, in such a case, the other parties in interest would generally be liable, without an express promise.

§ 228. Nor will the result be varied, if one of the parties gives his separate engagement to pay, provided the

same is not received in discharge of the joint liability. This is illustrated by the case of *Hotchkiss v. Ladd and Warner*, 36 Vermont, 593, A. D. 1864. There the question was whether the declaration was sufficient upon demurrer. The court construed it to mean that the defendants, being in partnership together, and desiring to purchase goods for their joint benefit from the plaintiff's firm, agreed with the plaintiff that the sale should be made by the plaintiff to the defendants jointly, and that the plaintiff should take notes of the defendant Warner alone, as security merely, and not as payment; whereupon the goods were delivered to the defendants jointly, upon their joint promise to pay for them as specified in Warner's notes. And upon this construction of the declaration the court held that "it was a clear case of an original undertaking by Ladd, and upon the most ample consideration." But cases of this kind belong more properly to the law of partnership.

§ 229. Nor would it probably be seriously contended, that the statute applies to a case where two or more persons incur a joint liability, upon a consideration which enures exclusively to the benefit of one of them, if they acted jointly in the whole transaction, and there is nothing to show that the promisee had notice that the contract was not made for, and the consideration did not enure to the benefit of all.^(a) For obviously the liabilities of the parties cannot be marshalled into primary and auxiliary obligations, to the prejudice of a person who has dealt with them in ignorance of any fact, out of which the law would raise a distinction between the different liabilities.

§ 230. But there is a grave question, whether the statute is applicable to a case, where although the whole transaction proceeds upon the distinct understanding, that one of the two promisors has no direct interest in the consideration of the promise, and that he assumes a liability

(a) Fell on Guaranty and Suretyship, 32, citing *Waugh v. Carver*, 2 Henry Blackstone, 235.

entirely for the benefit and accommodation of the other, and in aid of his credit; yet the promise is made joint by its terms, or else the circumstances are such, that the law would generally imply, that it was the intention of the promisors to assume a joint liability. There is respectable authority for the opinion, that in all such cases the promisee can proceed against both the promisors as joint debtors, and hold them liable without any writing. In *Hetfield v. Dow*, 3 Dutcher (New Jersey), 440, A. D. 1859, the Chief Justice illustrated the general rule respecting the giving of credit to the third person as follows: "If A purchase goods to be delivered to B, or promise to pay for goods that may be purchased and received by B, (b) the promise of A is clearly an original contract, an engagement to pay his own debt and not the debt of B. So, if A and B jointly promise to pay for goods delivered to B, A and B are joint original debtors; it is a joint promise to pay the indebtedness of A and B, not a promise to pay the debt of B. Such a promise is not within the statute." The case, however, did not call for this remark, it being in fact an action against one person alone, whose undertaking was construed upon the evidence to be merely collateral, and no such point having been taken on the trial. A doubt respecting the application of the statute, in cases where the promise is joint, was also suggested in the course of the remarks of the court in *Bronson v. Stroud*, 2 McMullan (South Carolina), 372, A. D. 1842; *Boykin v. Dohlonde*, 1 Alabama Select Cases, 502, A. D. 1861; and *Swift v. Pierce*, 95 Massachusetts (13 Allen), 136, A. D. 1866, though in neither case was any definite opinion upon the point either called for or expressed.

§ 231. But there are three reported cases, one in England and two in the United States, where the question came directly before the court, whether the statute applies to a joint undertaking, into which one of the joint parties

(b) But see *Outler v. Hinton*, and other cases in chapter vii, article ii, as to the effect of the word "purchase," and others of similar meaning.

entered, with the full knowledge of the promisee that the consideration would enure exclusively to the benefit of the other; and in each case it was held that the particular promise before the Court was good without writing. We will carefully analyze these cases, in order to ascertain whether they can be sustained upon principle; and if so, what is the nature of the exception to the general rule which they establish.(c)

§ 232. The first of these is the English case of *Scholes and another v. Hampson and Merriott*, tried before Chambre, J., at the Lancaster Assizes, A. D. 1806, and reported in Fell on Guaranty and Suretyship, 33, from notes taken by the author himself, in the following words: "The defendant Hampson had applied to the plaintiffs, to purchase from them a quantity of cottons upon credit; which they refused to let him have, unless some one would be answerable for the payment. He afterwards brought with him the other defendant, who was a near relation of his, but not at all connected with him in business, and which was well known to the plaintiffs. The defendant Merriott then requested the plaintiffs to let Hampson have what cotton he might want, and agreed, verbally, that the credit should be given to them jointly, *and the invoices made out in their joint names*. Several parcels of cotton were accordingly delivered by the plaintiffs to Hampson, who, from time to time, made payments for the same. But becoming insolvent, this action was brought against him and Merriott, for the balance. Hampson had let judgment go by default, and the question was as to the liability of Merriott. It was objected on his behalf, that upon these facts, Merriott could not be considered as a partner, but was only surety for Hampson's payments; and there-

(c) In the enumeration of the cases bearing upon this question, we lay out of view *Durham v. Manrow*, 2 New York, 533, because there the court gave no authoritative decision upon this point, although it came directly in question. Still the weight of the case, especially with the explanation of the views of Bronson, J., in 2 New York, 229, 230, is against the validity of the verbal undertaking of the joint promisor, who comes in aid of the other's credit.

fore his undertaking was for the debt of another, and void by the statute of frauds as not being in writing ; and it was contended that the permitting such parol promise to avail, would be virtually to repeal the statute. But Chambre, J., overruled the objection, not thinking this to be a case within the statute, and the decision was never afterwards questioned." In this case, it will be noticed, not only was the defendants' undertaking expressly made joint by its terms, but the parties carefully provided that the sale should be made to the defendants jointly, which may well have been regarded as superceding entirely the original negotiation contemplating a purchase by Hampson alone, and the procurement of some other person to become a guarantor for him.

§ 233. But in the subsequent American case of *R. and J. Wainwright v. Straw and Cunningham*, 15 Vermont, 215, decided in 1843, the word "joint" did not appear to have been used by the promisors, in the verbal promise upon which the action was founded ; and the character, in which they incurred their respective liabilities, was matter of inference merely ; although the contract appears to have been accepted as a joint undertaking. There the first and second counts of the declaration relied upon an instrument, therein called a note of hand, whereby the defendants, jointly and severally, promised to pay a certain sum in chattels. The court held this instrument to be void, for uncertainty, because the time for payment was left blank, and there was a misdescription of the payees ; but the declaration contained also a count for goods sold and delivered. At the trial, the agent of the plaintiffs testified that both defendants "came to him and said *they wished to buy a stove for Straw*, but that both would be responsible to R. and J. Wainwright for the pay ; that it was upon their joint responsibility that he sold the stove ; that they agreed to pay for the stove and pipe which he then sold them" in certain articles of personal property mentioned by him, at certain specified times, and that the so-called note "*was intended to have*

been written according to the contract." The cause was tried by the judge of the court below without a jury, and it would seem from the report that this was all the evidence before him; and the plaintiffs having recovered judgment upon the general count, the question whether the promise was within the statute came before the Supreme Court, upon exceptions to the admission of the agent's testimony, and to the ruling that the plaintiffs could recover.

§ 234. It was held, that inasmuch as the time for performance had elapsed, the special contract constituted no objection to a recovery, under the general count, of the value of the goods agreed to be given for the stove; and upon the question whether the statute applied, the opinion proceeded as follows: "It is also objected that the contract, so far as Cunningham is concerned, is within the statute of frauds. To bring a case within the statute of frauds, it is necessary that the promise should be collateral to, and in aid of, the promise of another. But in the present instance, the promise of the defendants is joint. They both made the purchase, and upon their joint responsibility." We add what was said upon the question whether Cunningham was a surety, as it depends upon the same principle. "It is also said that the general action will not lie against Cunningham, as he stands but a surety for Straw. If such was the relation of the parties, there would be weight in the objection. But such is not the case. To create this relation, the sale should have been made to Straw alone. The fact that it might have been for the individual use of Straw is not sufficient to create the relation of principal and surety." The opinion does not specify any reasons why the defendants' contract to pay was construed to be joint. Undoubtedly it was so construed, under the rule, that in the absence of any thing showing a contrary intention, the law presumes a contract, creating the same liability, entered into by two or more persons simultaneously, and upon the same con-

sideration, to be joint.(d) But although the so-called note was void as a contract, by reason of the uncertainty respecting the payees and the subject-matter, it may have been regarded as sufficient evidence, in connection with the testimony of the plaintiffs' agent, that whatever liability was assumed by the defendants was intended to be joint and several.(e)

§ 235. But in the recent case of *Gibbs v. Blanchard*, 15 Michigan, 292, decided A. D. 1867, the majority of the court distinctly laid down the rule that a joint promise is out of the statute, notwithstanding that the consideration moved directly from the promisee to one of the promisors.

(d) See 1 Parsons on Contracts, fifth edition, pp. 11, et seq.

(e) A case where the action was evidently founded upon the decision in *Wainwright v. Straw*, which was cited for the plaintiffs upon the argument, is to be found reported in 79 Massachusetts (13 Gray), 613, A. D. 1859, under the title of *Stone v. Walker*. The plaintiffs were lawyers, and brought an action against Comfort M. Walker and Benjamin Walker, to recover for their services in defending the former upon a criminal charge; insisting that the two defendants engaged the plaintiffs jointly, and that the services were rendered upon their joint credit. C. M. Walker was defaulted, and B. Walker alone defended the action. At the trial, it was proved on the part of the plaintiffs, that the two defendants came together to one of the plaintiffs, and that B. Walker said: "We want you to go to Southbridge and take care of this case; they are abusing Comfort, and I mean to stand by him; I mean to assist him." The evidence was very conflicting, and the judge seems to have taken refuge in the obscurity of his charge; for he instructed the jury that as the services were to be rendered for the benefit of C. M. Walker, the other defendant would not be liable unless they found that he made "an original express promise" to pay for them. Upon this charge the jury found a verdict for the defendants; and upon the hearing of the exceptions, the plaintiffs' counsel contended, that inasmuch as the promise was not within the statute, if the defendants assumed a joint liability, the question was, not whether B. Walker promised to pay the plaintiffs, but whether he employed them. But Shaw, C. J., in his opinion, said that it was for the jury to decide, whether B. Walker's promise was original or collateral, and that without an express promise he would not be liable for services rendered to C. M. Walker; and the exceptions were overruled. The case is therefore no direct authority upon either side of this question.

There the declaration contained a special count, to the effect that the defendants in the court below (Daily and Gibbs), in consideration of the sale of a horse by the plaintiff to Daily, agreed to deliver to the plaintiff their note for \$60, payable in six months to the plaintiff or bearer; that the horse was delivered to Daily; but that the defendants had refused either to give their note, or to pay for the horse; to which were added the common counts for goods sold and delivered. At the trial it appeared that Gibbs and Daily called together upon the plaintiff "and Gibbs asked the plaintiff if he wanted to sell his mare; plaintiff said he did; Gibbs inquired the price, and being told sixty dollars, wanted to know if the plaintiff would take Daily's note, if he, Gibbs, would sign it, and see it paid;" the plaintiff assented; but Gibbs being anxious to return home, it was agreed that Daily should go with the plaintiff and see the mare, and if she suited him, he might take her away and give his note, and the first time Gibbs went to town, he would sign it. Daily accordingly took the mare and signed a note for \$60 at six months, which Gibbs subsequently indorsed, but as the indorsement was made on Sunday, it was void under the Michigan statute. The note was tendered to the defendants at the trial. The report does not expressly state that the note was not payable to the order of Gibbs, or that it was in the hands of the plaintiff when Gibbs indorsed it; but both these facts are to be inferred from the abstract of the argument of the counsel.

§ 236. The judge charged the jury, upon the question of joint liability, that if the understanding of the parties was "that Gibbs and Daily were the buyers of the mare, and that both were to be liable as purchasers for the purchase price, and accordingly should become joint makers of a promissory note for its payment, though Daily was less relied upon by the plaintiff than Gibbs, and though in point of fact it was understood that the mare when bought should belong to Daily, the plaintiff is entitled to recover; that the principle in this class of cases

is, that if the agreement be such that two persons, in the purchase of goods, do at the same time become co-debtors to the seller for the price, then both are purchasers; and the case is not within the statute of frauds, and no memorandum in writing is necessary." The jury found a verdict for the plaintiff, and the judgment thereon was affirmed by the Supreme Court, Christiancy, J., delivering the prevailing opinion, and saying that the charge "was not only correct, but that it expresses the true rule of law applicable to the question with remarkable clearness." This conclusion the learned judge supported in an argument of considerable length, the substantial effect of which is to hold that whenever there is a sale upon the joint credit of two persons, the statute does not apply, as in that case the sale is deemed to have been to the persons to whom credit was given, and the plaintiff is entitled to recover as upon a sale to both jointly. (f)

(f) The learned judge began by saying that the language of the statute indicates that the class of promises required to be in writing, includes only those which are secondary or collateral to, or in aid of the undertaking or liability of some other person, whose obligation, as between the promisor and the promisee, is original and primary. Consequently it applies only to those which, if valid, would create a liability on the part of the promisor, distinct and several from that of the person in whose behalf it is made, and not a joint liability with him. For if the obligation of the two is joint, neither is collateral to the other, and the joint promise is original as to both. To say that both cannot become jointly liable upon a joint promise, not in writing, to pay for goods purchased for and delivered to one of them, is but another form of declaring that it is not competent for both to become original promisors, as between them and the promisee, unless each is under an equal obligation, as between themselves, for the ultimate payment of the debt. Such a proposition cannot be maintained upon principle or authority; and to allow the relation between the promisors to be shown, for the purpose of defeating a promise which both promisors made as original, would operate as a fraud upon the vendor. Passing to the consideration of *Wainwright v. Straw*, the learned judge remarked, that the decision was placed in part upon the ground that the sale was made to both. "Now," said he, "I can see no difference in legal effect, between the case where A and B say to a merchant, 'We want to buy a stove for B, and both of us will be responsible,' and the case where A says, 'B wishes to purchase a stove, but we will both be responsible.'" In each case it is a sale for the benefit of one on the

§ 237. On the other hand, there is some authority for the contrary doctrine, namely, that a joint promise is within the statute, where the consideration moved exclusively to one of the promisors. This appears to have been assumed to be law in *Wallace v. Wortham*, 25 Mississippi, 119, A. D. 1852, although there was no direct ruling upon the point. The case being meagerly reported, we are unable to ascertain whether the facts properly raised any question connected with the present inquiry.

§ 238. But in a Tennessee case, *Matthews v. Milton*, 4 Yerger, 576, decided A. D. 1833, an opinion, directly contrary to the ruling in *Gibbs v. Blanchard*, was delivered by Chief Justice Catron, afterwards an associate justice of the United States Supreme Court. There the

joint credit of two, and the real question is, whether the credit was given to both jointly. Wherefore he thought that the decision in *Wainwright v. Straw*, notwithstanding that the opinion assigns, as the reason for holding the defendants liable, that the sale was made to both, was really put upon the broad ground that the sale was upon the joint credit of the defendants; and he added that in all cases where the sale is upon the joint credit and promise of the defendants, although the property is purchased for and delivered to but one of them, the legal effect of the transaction constitutes it a sale to the two jointly, the sale being to the person or persons to whom credit was given. For these reasons, he held that the plaintiff was entitled to recover upon the count for goods sold and delivered to the defendants, but not upon the special count, for that alleged a sale to Daily alone. The term of credit having expired, there was no objection to a recovery upon a common count, notwithstanding the special contract. With this opinion, one of the other two judges fully concurred; but Campbell, J., while concurring in the result, said, that upon the whole he regarded the charge as having fairly presented the question, whether there was or was not a contract of suretyship, and for that reason there was no error in it, although he had had some doubt whether some of the rulings were not open to the objection, that they rested too much upon the question of a joint obligation. "I cannot," he said, "regard the mere form of the liability (as joint or several) as having any bearing on the applicability of the statute, inasmuch as sureties very generally assume joint obligations with their principals, and are nevertheless protected in all the rights of suretyship, and vested with all its immunities."

action was brought against the auxiliary promisor alone, under an act passed in 1789, which permits several actions to be brought against persons jointly liable. (g) Upon the trial it appeared that the defendant (Philip Milton) and his brother William were together in the plaintiffs' store, and the defendant said to the plaintiffs, that whatever goods William "took up" in the store, he, the defendant, would pay for out of a cotton contract, which the plaintiffs and the defendant were about to make; the goods were thereupon, and on the same day, delivered to William, and debited to William and the defendant jointly. It was also proved that before the defendant's promise, the plaintiffs had told their clerk not to credit William, but subsequently William purchased, on credit, other goods at the plaintiffs' store, which were debited to him individually, and which were not in question in this action.

§ 239. The judge charged the jury, in substance, that if William was ever liable for the account, the defendant was not liable, and that charging the account to both was strong, though not conclusive evidence, that credit was given to William; but if they found that credit was given exclusively to the defendant, then he would be liable. A verdict having been rendered for the defendant, the plaintiffs brought error, upon exceptions to this and other parts of the charge. The Chief Justice construed the charge as follows: "The circuit judge charged the jury, that if there was no liability resting on William, and the credit was extended to Philip alone, then the promise was

(g) Caruthers and Nicholson's Compilation of the Laws of Tennessee, page 415. The learned judge who delivered the opinion in *Gibbs v. Blanchard*, treated as obiter all that was said in *Matthews v. Milton* upon the question of the promisors' joint liability, saying that there was no evidence tending to prove a joint promise. The report would indicate that the promise was to pay out of a particular fund, not then in existence; but as this is inconsistent with the whole opinion, which assumes that the credit was given to both brothers jointly, it is probably erroneous in that particular. In all other respects, the whole transaction was not distinguishable, upon any substantial ground of difference, from that in *Gibbs v. Blanchard*.

original, and without the statute; but if William and Philip were jointly trusted, and both held responsible, and so charged on the books of the plaintiffs, then the promise was collateral on the part of Philip, because he undertook to pay the debt of William." He proceeded: "That the goods were advanced upon the joint credit of both is evident. They stand so charged on the books, and these were given in evidence for the plaintiffs for some of the articles, on the oath of one of the plaintiffs, under the book debt law." Then after quoting the Tennessee statute of frauds, and overruling the point that if the promise was made before the debt was contracted the statute does not apply, he added: "If William was bound to pay for the goods, it was his debt; Philip could not be bound, unless in writing. It follows they could not be jointly charged." The learned Chief Justice then cited with approbation the rule laid down in *Matson v. Wharam*; and added that it accords with the intention of the legislature, which was that no one should be bound to pay for property received by another, unless the deliberation of a written agreement had intervened, and "that a naked promise could be easily proved, and not possibly disproved, in most instances, and therefore should only be established by written evidence." Accordingly the judgment was affirmed.

§ 240. In *Hill v. Doughty*, 11 Iredell (North Carolina), 195, decided A. D. 1850, the question was whether a joint promise of two persons to pay the several precedent debts of the promisors, founded upon a consideration moving to both, was within the statute. The principles applicable to the validity of such a promise, and of one growing out of a new transaction are not in all respects identical; but they are sufficiently similar to render the case a very pertinent authority upon this inquiry. The action was against two defendants to recover upon a promise to pay a debt due by their father, they having received their distributive shares from his estate. There was a third child, (a daughter), who was not a party. It appeared that the

two defendants made the promise in consideration of forbearance, the creditor threatening to institute proceedings to compel them to refund what they had received, or enough to pay his debt. In the court below, the plaintiff had judgment upon a case stating the facts, and the defendant appealed to the Supreme Court.

§ 241. Ruffin, C. J., who delivered the opinion, after briefly advertng to, without deciding the question, whether there was a sufficient consideration for the promise, said that if that point be assumed for the plaintiff, it will not follow that this verbal promise, by two of the next of kin, will maintain this joint action against them. He added: "Now the liability to creditors, of the defendants and their sister, as next of kin, was not joint; but arose, if at all, by reason of that portion of the assets of their father, which came to their respective hands, as their several shares of the estate. Each was therefore liable only for an equal proportion of the money; at all events in the first instance, and while the others were able to pay their parts, which is not questioned here. Hence, it is obvious, if one of the defendants had verbally promised to pay the whole of this demand, that the promise would not have been binding under the statute of frauds, beyond his own one-third; for beyond that the liability was not his own, but that of another. It seems clear that an undertaking by the defendants, in a joint form, to pay the whole debt, cannot alter the rule of law, or the legal effect of the promise as to each, in that respect. For if two persons owe another separate debts, their joint oral promise to pay both debts, cannot sustain a joint action; since it is a promise by each to answer for another in respect to all but his own original debt. *Per curiam*. Judgment reversed and judgment of nonsuit."

§ 242. These are, it is believed, all the reported cases to be found upon either side of the question. The policy of the statute clearly includes joint promises, as well as several; for it is as easy to manufacture evidence,

and as difficult to detect perjury, in one case as in the other. Is there then any thing in the words of the statute to exclude them, or do other legal principles require us to do so? The argument in favor of the broad rule adopted in *Gibbs v. Blanchard*, commends itself to the mind upon first impressions; but we think that further reflection will show that it is more specious than solid; that there is nothing in the statute to justify the courts in laying down such a rule; and that its adoption would be a long step backward in the progress of legal science, tending to the unsettlement, and the ultimate abrogation of principles, which have been regarded as well settled for upwards of a century.

§ 243. And first, let us examine the question upon principle. The argument in favor of excluding joint promises from the statute, appears to rest entirely upon the *unity* existing between the promise of the person benefited by the transaction, and that of the other promisor; which, it is said, is so complete that neither can be said to be collateral to the other. These premises may be granted, without conceding the conclusion that the statute is inapplicable to the auxiliary promise, thus united with the other. For, as we have had occasion to remark before, the statute does not use either of the terms "collateral" or "original;"^(h) and although it is true that all collateral promises are within the statute, the converse of the proposition, that all promises within the statute are collateral, by no means necessarily follows. Nor can it be said with truth, that the language of the statute, by necessary implication, calls for two several liabilities. A "special promise to answer for the debt, default or miscarriages of another," may consist of a joint as well as a several undertaking, with the person answered

(h) The complaint, that the use of the word "collateral" has sometimes a tendency to lead into error in construing the statute, is of early date. Per Lord Mansfield, C. J., in *Harris v. Huntbach*, 1 Burrow, 375. See Buller's *Nisi Prius*, 281; Roberts on *Frauds*, 224, as well as the remarks of Comstock, C. J., in *Mallory v. Gillett*, ante, § 50, and of Grover, J., in *Brown v. Weber*, 38 New York, 190.

for. This will become immediately apparent, by applying the words to written promises of that character, some of which are of constant occurrence; as for instance joint bonds, conditioned that one of the obligors shall pay a debt or faithfully discharge the duties of an office.

§ 244. Again, if the unity of the promise suffices to take it out of the statute in one case, it will suffice in every other; consequently promises to answer for a previously existing debt of another are not within the statute, provided the debtor joins with the new promisor in making the promise. It is difficult therefore to discover where the principle stops; but a mere glance at its necessary consequences suffices to show, that it runs counter to currents of authority in many directions; and that its general recognition will require the remodelling of other rules, besides the one under which it is now being discussed.

§ 245. In truth it seems that the importance given to the unity of a joint promise, proceeds from confounding that feature, with another closely resembling it, and equally inherent to an undertaking of that description, to wit, its *absolute character*. If the question were still open, it would be hard to answer the argument, that a joint promise is not within the statute, because it imports a direct and absolute undertaking of each promisor to answer for himself, and not for the other. But it is too late to predicate any argument upon that characteristic of a joint promise, for it may be equally inherent to a several promise; and, as we have already shown, and as the argument upon the other side of the question concedes, the rule is perfectly settled that a several promise, though absolute, is within the statute, if the person primarily benefited also incurred a similar liability.(i)

§ 246. Next, let us consider the argument ab inconvenienti, which is very properly resorted to, where it is difficult to discover, upon which side lies the weight of argu-

(i) See ante, § 140.

ment upon principle and authority. The language of the rule, as laid down in *Matson v. Wharam*,^(j) clearly includes joint promises; and it has been reiterated, in words to the same effect, in all the text books and in nearly every subsequent case.^(k) If, therefore, this class of promises is to be excluded from the operation of the statute, an exception must be ingrafted upon this ancient and now universally recognized rule. Moreover, every case where the auxiliary promise is absolute in its terms, will presumptively constitute an exception, within the principle adverted to in commenting upon *Wainwright v. Straw*;^(l) and the effort to prove that it was the intention of the parties in the particular case, to assume several liabilities, will almost invariably fail; not only on account of the difficulty of enabling witnesses and jurors, to understand the technical distinction between a joint and a several promise; but also because it will very rarely occur, that the parties themselves had any knowledge of such a distinction. It would seem therefore that the exception, if once introduced, will end in practically swallowing up most of the rule, by confining it to those cases where one promise was in terms conditional upon non-fulfilment of the other.

§ 247. For these reasons, we think that the correct rule, with respect to joint promises, is that they are within the statute, under the same circumstances as those which are several. If the consideration of the promise is a

(j) Ante, § 146.

(k) As far as we have noticed, there is no case where any exception to the general rule is hinted at, except those cited in this article. The text books use language equally general. Mr. Roberts, writing a century and a quarter after the statute was enacted, congratulates himself that in the effort to determine what is within the statute, "one anchorage has been gained, viz.: that the person undertaken for must be or become liable at the time the promise by the third person is made," (Roberts on Frauds, p. 223), which is very nearly the language in which, under the ruling in *Gibbs v. Blanchard*, a promise without the statute would be described.

(l) Ante, § 234.

sale, or loan made, or services rendered by the promisee to one of the promisors, and upon his credit, the promise of the other to respond for the price is within the statute, whether it takes the form of a joint or of a several undertaking. But where a sale or loan is made, or services are rendered to two persons jointly, as was clearly the case in *Scholes v. Hampson*, it is a matter of no moment, whether they assume a joint liability for the price, or whether each undertakes severally therefor. In that case, the consideration of the promise flows directly from the promisee to both the promisors; and the legal title to the subject of the contract vests in both of the latter, immediately upon the consummation of the bargain. If one of the promisors secures the entire benefit of the transaction to himself, he does so by virtue of an arrangement with his co-promisor, with which the promisee has no concern, and over which he exercises no control; amounting to a release, by one of the joint owners to the other, of his undivided interest. Where the transaction is of this character, it is clear that each of the promisors undertakes for himself and for his own debt, in substance as well as in form; and the only difficulty, if for any reason the promises are said to be several, is to reconcile that description of promise, with the character of the purchase. No doubt, in many of the border cases, it is difficult to determine whether the sale, or loan was made, or the services were rendered, to one or both of the contracting parties. *Wainwright v. Straw* is such a case. But difficulties of that kind occur in the application of every legal principle; and in this particular class of cases precisely the same difficulty would present itself, if the same question arose in any one of the many other forms, where such questions constantly arise; for instance, if the action was against the vendor of the chattel for a breach of the implied warranty of title, or of an express warranty of quality.

ARTICLE II.

Where the person benefited and the auxiliary promisor undertook concurrently to respond; but the person benefited was either a married woman or an infant.

(1) *Observations applicable to either species of auxiliary promise.*

§ 248. We have next to consider the question whether the fact, that the person who primarily undertook to respond, was under a disability to enter into a binding contract, necessarily renders the undertaking of the auxiliary promisor original. It arises where an infant, not contracting for necessaries, or a married woman, not acting within the limited sphere in which her contract binds her estate in equity, or under circumstances where the local statutory provisions allow her to make general contracts, nevertheless assumes a liability, and receives credit for goods, etc., and another person enters into a concurrent promise to respond for the price. In such a case, will the latter's promise be regarded as an original undertaking, or as a special promise to answer for the debt or default of another? This question is not free from difficulty; and although the text-books seem to agree that in both the cases suggested, the promise of the person not benefited by the transaction will be regarded as original, the principle upon which the doctrine is maintained, especially in the case of an infant's contract, is by no means clear; and the authorities do not sustain the confident opinions of the text-writers. (a)

(a) We append some extracts, showing a remarkable unanimity of opinion among the leading elementary writers on this subject, premising that every case cited is abstracted, or otherwise sufficiently noticed, either in this note or in the text. A reference to the cases will show how little justification they contain for so much confidence of opinion. In Chitty on Contracts (8th edition), p. 482, it is said: "If the third party be not by law liable for the demand, as in the case of goods, not being necessaries, furnished to an infant, the defendant's promise cannot be considered as collateral, and consequently need not be in writing;" citing *Harris v. Huntbach*, 1 Burrow, 373, and *Duncomb v. Tickridge*, Aleyn, 94. Mr. Browne, in his Treatise on the Statute of Frauds, § 156, says: "Thus, if the party be a minor, or a married woman, or under any other legal disability as to forming binding contracts,

§ 249. Manifestly those cases, where the infant or married woman, although primarily, or even exclusively benefited by the transaction, did not profess to assume any liability for the consideration, or was not made the subject of any credit, call for no special remark. For there is nothing to distinguish them from the ordinary cases, where goods were delivered, money loaned, or services rendered to one person, exclusively upon the credit of another; as the circumstance that the person primarily benefited was under a disability to enter into a contract, becomes wholly immaterial, when such person made no attempt to contract; or the attempt was unsuccessful, in consequence of the non-concurrence of the other party.

it is manifest that a promise by a third person, to answer for him or her, in a matter within the range of that disability, cannot be affected by the statute of frauds," citing *Harris v. Huntbach*, 1 Burrow, 371; *Chapin v. Lapham*, 37 Massachusetts (20 Pickering), 467; *Roche v. Chaplin*, 1 Bailey, 419; *Connerat v. Goldsmith*, 6 Georgia, 14; *Mease v. Wagner*, 1 McCord, 395; and *Drake v. Flewellen*, 33 Alabama, 106. Of these cases, *Mease v. Wagner* (ante, § 228), and *Drake v. Flewellen*, are entirely irrelevant to the question, and must have been cited by mistake. The others are fully examined in the text. In the English notes to the posthumous edition of Smith's *Lectures on Contracts*, p. 47, the same doctrine is doubtless intended to be stated (although unfortunately expressed), and *Harris v. Huntbach* is cited to uphold it. So in *Burge on Suretyship*, p. 29: "If therefore the person, for whom the promise was given, was exempt from all liability by reason of his infancy, the promise given is original, and not collateral," citing *Harris v. Huntbach*. Messrs. Hare and Wallace, in their notes to Smith's *Leading Cases*, sixth American edition, vol. 1, p. 473, say: "A guaranty of the payment of a debt, or performance of a contract by a feme covert, minor, or other person under a legal disability to contract, will follow the same rule and bind the guarantor; because there is no obligation resting upon the principal," citing *Harris v. Huntbach*, also *Chapin v. Lapham*, 37 Massachusetts (20 Pickering), 467, and *Sanborn v. Merrill*, 41 Maine, 467. But they add: "This would seem, however, not to be true, when the contract of the infant is for necessities, or when he affirms the contract after coming of full age; although the minority of the person who receives or profits by the consideration, may tend more or less strongly to show that he was not trusted, and that credit was given exclusively to the promisor." No cases are cited in support of this last remark, and with respect to what

§ 250. This was the ground upon which *Sanborn v. Merrill*, 41 Maine, 467, A. D. 1856, was decided; although it has been erroneously quoted, as authority for the proposition, that a contract collateral to that of an infant, is not within the statute, because the infant is not liable. There it appeared on a report from nisi prius, that the action was to recover for services and expenses of the plaintiff, as an attorney and counsellor at law, in a suit, in which the defendant was the next friend of an infant plaintiff; and the proof of the promise was, that the defendant said that he had employed the plaintiff in the first instance to carry on the suit, and agreed to pay him, and he should pay him. The court held that the next friend of an infant, as such, is not liable for the costs which might

is said about the affirmance of the contract, after the infant becomes of age, it cannot be law; because, as we have frequently had occasion to say, the application of the statute is not affected by any thing which occurs after the contract was entered into. See § 152, ante. In Addison on Contracts, sixth English edition (1869), on page 59, it is said: "If goods are furnished to an infant at the request of the defendant, the defendant's undertaking or promise to pay for them, is not a collateral promise to answer for the debt of another, inasmuch as the infant is not liable to pay for them, and cannot be indebted by reason of his minority," meaning, doubtless, that such is the rule, if they are so furnished on the request and promise of the infant, as well as of the defendant. The authorities cited are *Harris v. Huntbach*, and *Duncomb v. Tickridge*, Aleyn, 94. Professor Parsons, in his Treatise on Contracts, does not mention the question, except at page 4 of volume second of the fifth edition, where he says: "It" (a guaranty) "is a promise to pay the debt of another; but the guarantor may be held, although no suit could be maintained upon the original debt as where the guarantor promises to be responsible for goods to be supplied to a married woman, or to be sold to an infant, not being necessaries. But where the original debt is not enforceable at law, the promise to be responsible for it is considered, for some purposes, as direct and not collateral; as, in fact, the original promise." The authorities cited under the second branch of this proposition are *Harris v. Huntbach*, 1 Burrow, 371, and *Read v. Nash*, "there cited;" also *Buckmyr v. Darnall*, 2 Lord Raymond, 1085. None of the above mentioned cases, except *Chapin v. Lapham*, 20 Pickering, 467, and *Roche v. Chapin*, 1 Bailey, 419, sustained these authors' propositions, as far as they assert that guaranties of the contracts of infants and of married women are original promises. All of them having any relevancy to the subject, are

be recovered against the plaintiff, if the suit should be unsuccessful; the infant plaintiff being liable for costs. The opinion then proceeds: "The promise to answer for the debt or default of another must be in writing, to bind the person thus promising. But an individual may originally undertake to pay for services which are to be rendered, or for goods which are to be delivered to another. The question in such cases is, on whose credit the services are rendered or the goods delivered. Nothing is clearer than that a person may contract for the performance of services in which he is in no way personally interested.

cited and criticised with reference to this principle, in the text of this chapter; except *Read v. Nash*, and *Buckmyr v. Darnall*, which will be found at §§ 130 and 143; and the case in *Aleyn*, 94, which is copied in full from the folio of 1681, as follows. "*Duncomb v. Tickridge*. In an action upon a quantum meruit for dyet, lodging, and apparel, the evidence was that the defendant, being an infant, was sent with a Russia merchant beyond sea by his mother, who did agree to pay him so much for dyet, washing and apparel. And the merchant in Russia committed the care of the infant to the plaintiff, and promised to pay him for his dyet, lodging and apparel. And Roll directed the jury, that if an infant comes to a stranger and boards with him, there is a contract in law implied, that he should pay for his board as much as it is worth; but if another undertakes to pay for his boarding, this express agreement takes away the implied contract. And the verdict was accordingly found for the defendant." The case was decided in 24 Car. II, and of course the statute of frauds had no application to it: it merely holds that the express contract of the "Russia merchant" prevented an implied contract from arising on the part of the infant. This would be equally true if the infant was an adult, provided the jury found that credit was given exclusively to the other party; as was decided in *Sinklear v. Emert*, 18 Illinois, 63, A. D. 1856, where a father, being about to leave home, made a special contract with the plaintiff, to board his infant son during his absence; and in an action upon a quantum meruit for the board against the infant, the plaintiff was defeated; the court holding that the rule was the same as if the question of infancy was not in the case, when the father alone would be liable, as the credit was given exclusively to him. And in *Ellicott v. Peterson*, 4 Maryland, 476, A. D. 1853, the defendants were executors of an infant's grandfather, who, under the Maryland law, is not bound to support a grandchild; and it was held, that they were liable upon a promise of their testator to the infant's stepfather for the latter's maintenance, it appearing that the testator verbally undertook to respond therefor, at the time of the marriage of his daughter (the infant's mother) to the plaintiff.

It is of no importance to the individual performing them, who is to be thereby benefited. It is sufficient for him, that he performed them at the instance and on the credit of his employer. In such case the promise need not be in writing." So the plaintiff had judgment.

§ 251. Although both married women and infants are, in common legal parlance, said to be under disability to contract, yet the effect of a married woman's contract is very different from that of an infant's; and this difference is supposed by many, probably with correctness, to exercise a controlling influence in the application of the statute. We will therefore consider separately, the cases bearing upon each species of auxiliary contract.

(2) Where the promise was auxiliary to that of a married woman.

§ 252. Where the person primarily assuming to respond was a married woman, and the transaction was not one of the exceptional cases, where her contract is valid, there is great weight in the argument that a guaranty of her contract is an original undertaking. For at common law a married woman's executory contract is absolutely void; and it is even held, that such a contract is incapable of ratification by her, after the cessation of the coverture, by the death of her husband or by a divorce, without such a new consideration as would suffice to sustain it, as a new and independent contract.^(b) And where she has a separate estate, her general contract will not bind her estate even in equity; in order that it should have that effect she must in some form create a charge or lien upon it. When she has done so; or if the transaction is one, where she or her estate is made liable by statute; the undertaking of a person who "comes in aid" of such liability is clearly collateral, within the principle of all the authorities heretofore cited; but in all other cases, as there is no legal or equitable debt of a third person, to which

^(b) Littlefield v. Shee, 2 Barnewall and Adolphus, 811; Meyer v. Haworth, 8 Adolphus and Ellis, 467.

such an undertaking can be collateral, the promise of the so-called guarantor would seem to be original. And yet there are many cases, where the credit of a married woman is recognized as having a legal existence, although the facts were not such as to render her or her property liable even in equity.(c)

§ 253. And in one case in the New York Supreme Court, *Kimball v. Newell*, 7 Hill, 116, A. D. 1845, which was an action of covenant, upon a sealed guaranty of the payment by a married woman, of the rent of a dwelling leased by her, Nelson, C. J., said that it had been decided by the English Court of Common Pleas, that a verbal promise to respond for a married woman's debt is void, within the statute of frauds. The defendant insisted that as his principal, being a married woman, was not liable upon her covenant, he, the surety, was also not liable: and in discussing the question, the learned Chief Justice referred to *Maggs v. Ames*, as an action against a surety for a married woman. "There," he said, "the question was whether the undertaking of the defendant was an original one, so as not to require it to be in writing. The court held that it was collateral, and therefore should have been in writing. But neither the counsel nor court supposed,

(c) The cases referred to are those, where an action has been brought against the husband for goods furnished to the wife, and it has been held that the goods were in fact furnished upon the credit of the wife, and not of the husband. *Bentley v. Griffin*, 5 Taunton, 356; *Holt v. Brien*, 4 Barnewall and Alderson, 252; and *Metcalf v. Shaw*, 3 Campbell, 22, are leading cases upon this subject. For other similar cases see 1 Parsons on Contracts, fifth edition, 348, and notes. The distinction between a wife's credit, and that of her husband, is very neatly taken in the opinion delivered in *Connerat v. Goldsmith*, 6 Georgia, 14. The case of *Darnell v. Tratt*, 2 Carrington and Payne, 82, cited ante, § 158, also recognizes the credit of a married woman as having a legal existence, in direct connection with the question whether a promise to respond for her is original or collateral; and although it was held there that the contract was not collateral, the absence of any allusion, by the court or the counsel, to a distinction growing out of the fact, that the person alleged to be the principal contractor was a married woman, is an indication that it was then supposed that no such distinction existed.

that the defendant would not have been bound, if the contract had been in writing. On the contrary that was assumed." But we think that a careful examination of the case referred to by the learned Chief Justice, will show that it is of no value upon this question.(d)

§ 254. However, *Miller v. Long*, 45 Pennsylvania, 350, A. D. 1863, is perhaps an authority for holding that the statute applies to a promise, collateral to a married woman's contract. There the defendant's wife signed a note, together with the defendant's step-son, in her own name and for her son's benefit; and at the same time the defendant, being present, was also requested to sign it; but he refused to do so, and told his wife, in presence of the plaintiff, that she should put her name to it and he would

(d) The case of *Maggs v. Ames* was decided in the year 1828, and is reported in 1 Moore and Payne, 294, and 4 Bingham, 470; according to both reports the declaration contained two special counts; the first upon the defendant's promise to pay, in case of dishonor, a bill of exchange to be drawn upon and accepted by one Ann Prickett, for a debt due from her; and the second upon a promise to pay the debt itself. The defendant pleaded five pleas; the fourth was to the effect that there was no writing as required by the statute of frauds; and the fifth, that at the time, etc., and thence hitherto, etc., Ann Prickett was a married woman. Both reports say that these pleas were pleaded to *both* counts. There was a special demurrer to the fourth and fifth pleas; and after argument the court gave judgment for the defendant. It will be seen, from this statement, that the question to which Chief Justice Nelson referred, could not have arisen; as the pleas of coverture and of the statute were entirely distinct; and in considering the plea of *coverture*, the court must have assumed, upon well settled rules of pleading, (the force of which was fully recognized in the opinion delivered), that both the promises set forth in the declaration were in writing. According to the reports of the *decision*, the court held that a plea of coverture of the original debtor was a good defence, not only to a count upon a promise to pay her debt in case of her default, but also to a count upon an absolute promise to pay it. But the *opinion* says no such thing; on the contrary it is directly the other way, with respect to the plea of coverture, and the plea of the statute, to the count upon the absolute promise. There are other discrepancies between the decision and the opinion, and some palpable errors in the latter. As far as the question now under examination is involved, both reports are wholly unreliable, and in truth incomprehensible.

see it paid, and afterwards he promised to pay it. The plaintiff had judgment in the Common Pleas; and error was brought thereon to the Supreme Court. There it was held that the defendant was not liable on his promise; first, because he was not the maker of the note and it would be in contradiction of the writing to hold him liable; and secondly, because "there is no promise in writing by him, and therefore no promissory note by him, and no valid promise to pay the debt of another, whether his wife's or her son's." The judgment was therefore reversed.(c)

§ 255. In *Connerat v. Goldsmith*, 6 Georgia, 14, A. D. 1849, the plaintiff sued to recover the value of certain furniture delivered to the defendant's wife; and it appeared that she had a separate estate; and that she purchased the furniture herself, and gave her note for the price, in exchange for which the plaintiff gave her a receipt in full; but evidence was given of a subsequent verbal promise by the defendant to pay the note. The court held that he was not liable, because it was evident that the credit was given to the wife and not to the husband; so that if the husband subsequently made a promise to pay the note, such promise was void within the statute of frauds, as being an engagement to answer for the debt of another. The opinion, however, speaks of the wife as being, as to her separate estate, a feme sole; and concludes by saying that the plaintiff has a remedy against her property. Unless there is something peculiar and exceptional in the law of Georgia, it is questionable whether the wife's property was answerable for the debt, either at law or in equity; so that upon the facts of the case, it would apparently be an authority for holding, that a promise is within the statute, whenever it was collateral to that of a married woman. But as the court assumed, whether rightly or not, that the

(c) The Pennsylvania married woman's act, passed in 1848, is not construed as giving a married woman any new power to contract debts. See Brightly's Purdon's Digest, 699 to 702, and note. The case cited in the text is shamefully reported; and we are inclined to think that the decision turned entirely upon a point of pleading.

woman's property was liable for the debt, the case cannot fairly be regarded as holding any thing more, than that an equitable liability of a married woman's property constitutes such a debt, that the statute of frauds will attach to a promise relating thereto; in the same manner as if the person benefited by the transaction, out of which it arose, was under no disability.

§ 256. In view of these decisions, (f) it is impossible to say that the law is settled that a promise to respond, concurrently with a married woman, upon a consideration moving to her, is not within the statute of frauds. All that can be said, is that the weight of reasoning appears to favor such a doctrine; but upon the authorities the question is an open one. Nor can we find much to shed light upon it, by consulting the cases where the undertaking was in writing. They all agree that the surety in such a case is bound, notwithstanding the coverture of the principal debtor; and the same rule obtains where the principal is an infant; but the reasoning upon which the liability rests is vague and by no means uniform. While they assert that "for some purposes" the surety is regarded as a principal, they do not in general state definitely what those purposes are, beyond the purpose of being made liable in the particular case. Thus in *St. Albans Bank v. Dillon*, 30 Vermont, 122, A. D. 1857, the court said that the maker of a joint note, where a married woman is the other party, and the transaction was for her benefit, "stands in a certain sense as principal promisor." But in *Smyley v. Head*, 2 Richardson (South Carolina), 590, A. D. 1846, upon the same state of facts, the court said: "The liability of the surety in such case may be supported, on the ground, that he shall not protect himself, by alleging the incompetency of the supposed principal, which may have been the very motive with the other contracting party for

(f) The head note to *Bagley v. Sasser*, 2 Jones' Equity (North Carolina), 350, A. D. 1856, implies that it is relevant to this subject; but we fail to discover its application, upon an examination of the case itself.

requiring security ; and by analogy to the law of principal and agent, the surety may be held liable as principal, for an engagement he has made in behalf of one, who was incompetent to contract," which apparently puts the liability upon the ground of an estoppel in pais. And in the case already cited, *Kimball v. Newell*, 7 Hill, 116, while Nelson, C. J., assigned no special reason for holding the defendant liable, Beardsley, J., put it upon the ground of an estoppel by deed. He says: "The defendant by his covenant admits she was thus bound, and he shall not . . . be permitted, on the ground now set up, to deny the legal existence of a covenant which is explicitly conceded by his own deed."

(8) *Where the promise was auxiliary to that of an infant.*

§ 257. Passing now to the consideration of the cases, where the person who was benefited by the consideration, and who assumed the primary liability, was an infant ; we observe that the principles which govern the liability of an infant, upon an executory contract not for necessities, would seem to render it still more questionable, whether the concurrent undertaking of another, to respond for a debt contracted by him, can be treated as original, by reason of any invalidity of the infant's promise. For while the contract of a married woman is, as we have seen, so absolutely void at common law, that a new promise, after the disability has ceased, will not suffice to sustain it, without a new consideration ; the rule is quite different with respect to that of an infant. Without undertaking to give here any comprehensive statement of an infant's rights and liabilities, it will be sufficient for our purpose to say, that while an infant is liable for all torts committed by him, in general his contract is not void but only voidable ; that is, he may, either during minority or a reasonable time after majority, avoid the contract ; or on the other hand, he may, after he attains majority, confirm and enforce it. It is said that contracts of suretyship, and other similar contracts, which the court can clearly see will not promote the infant's interest, can be declared void

by the court; but the better opinion seems to be that no such jurisdiction exists, and that no contract of an infant is absolutely void; it being the exclusive privilege of the infant himself to avoid his contracts. (g) The accomplished authors of the American Leading Cases, in the course of a chapter, which contains a very full and lucid discussion of the liabilities and rights of infants, say: "The numerous decisions which have been had in this country, justify the settlement of the following definite rule, as one that is subject to no exceptions. The only contract binding on an infant is the *implied* contract for necessities: the only act which he is under a legal incapacity to perform, is the appointment of an attorney: all other acts and contracts, executed and executory, are voidable or confirmable by him at his election." (h)

§ 258. The solution of the question seems to depend upon the legal character of the infant's contract, during the period which elapses between its creation, and its avoidance or affirmance. And in common legal parlance, such a contract is said to be binding on both parties, until it is disaffirmed by the infant. This expression defines with substantial accuracy the rights and liabilities of both the parties. To say that a contract is voidable imports, *ex vi termini*, that it is good until it is avoided. And the rule is well settled that no one but the infant himself can avoid his contract. Hence it seems very clear that after the making of a contract by an infant, and during the intermediate time elapsing before its disaffirmance, it has a legal value and character as a binding agreement, under which rights may be acquired or lost. Consequently there is a period of time, in which the collateral promisor and the principal debtor are concurrently liable, which is the test whether the former's contract is within the statute; for events happening after the contract has been entered into, are wholly immaterial to the determination of that question. (i)

(g) 1 Parsons on Contracts, fifth edition, 294, 296.

(h) 1 American Leading Cases, fourth edition, 244.

(i) See ante, § 152.

§ 259. But, as was shown in the note to section 248, the general opinion seems to be the other way, although it is not supported by much authority. The case most frequently cited, in support of the theory that the auxiliary promisor is liable, because the infant's contract does not bind him, is *Harris v. Huntbach*, 1 Burrow, 371, A. D. 1757, which, as we regard it, holds no such doctrine. There the promises upon which the action was brought were in writing, and so the application of the statute of frauds was not directly in question; but the case is a pertinent authority under the statute, because the pleadings presented the precise question, whether the undertaking was original or collateral. The action was upon a general indebitatus assumpsit, the declaration containing two counts; the first for money lent and advanced by the plaintiff, at the defendant's request; and the second for money laid out and expended by the plaintiff, at the like request. As the question respecting the first count was almost too clear for argument, it will suffice to say that it arose upon the defendant's note of hand, the consideration of which entured to the infant's benefit. To sustain the second count, the plaintiff proved that one Davidson, the gardener upon the estate of the defendant's infant grandson, applied to the plaintiff, by order of the defendant, for money to pay the workmen employed upon the estate; but the plaintiff refused to furnish the money, unless the defendant would sign a receipt therefor; whereupon the defendant wrote to the plaintiff a note requesting him to pay Davidson, "on the account of Master Hillier, for the workmen's use, the sum of 15*l*."; and upon this the plaintiff paid the money to Davidson, who executed his receipt therefor to the plaintiff. There was a verdict for the plaintiff, and a case was reserved for the opinion of the court upon the question whether the evidence was sufficient to support the verdict.

§ 260. Upon the argument the point was, whether the defendant's undertaking was original or collateral; it being conceded, that in the latter case the declaration should have been special, but in the former the general

count sufficed. The court held that it was an original, and not a collateral undertaking, for the reason that there was no proof that the plaintiff had any remedy against the infant. Lord Mansfield, C. J., said: "Here is a mansion-house belonging to an infant, which mansion-house has a garden belonging to it. It might not be necessary (in regard to the infant's situation and circumstances), to support this garden (which might be a pleasure garden), and no action will lie against the infant but for necessaries. It don't appear at all that there could be any remedy against the infant." Denison, J., added: "There is no privity between the plaintiff and the infant;" and Foster, J., said: "The infant was not liable, and therefore it could not be a collateral undertaking. It was an original undertaking of the defendant to pay the money." So the postea was delivered to the plaintiff.

§ 261. If these remarks of the judges be disconnected from the facts upon which they were predicated, there are some expressions in them, which seem to convey the idea that the liability of the defendant was original, merely because the person undertaken for was an infant. But if due weight be given to the peculiar circumstances, under which they were spoken, we think it will be manifest, that *Harris v. Huntbach* is not an authority upon either side of the question under consideration; for the infant had made no *express* contract; and what is said by Lord Mansfield about necessaries, is evidently upon the question, whether there was any thing, upon which the court could raise an *implied* contract against him. The conclusion was, not that the defendant had undertaken collaterally to respond for an infant's voidable contract; but that the infant was not liable upon any contract, express or implied; and the result would have been precisely the same, if "Master Hillier" had been an adult; only in the latter case the remarks about necessaries would have been irrelevant.(j)

(j) In *Tupper v. Cadwell*, 53 Massachusetts (12 Metcalf), 559, A. D. 1847, it was held that an infant was not liable, upon an implied contract for the

§ 262. The case of *Roche v. Chaplin*, 1 Bailey (South Carolina), 419, A. D. 1830, has been also supposed to contain a judicial sanction of the proposition that a promise to pay an infant's debt is original. The report does not disclose the circumstances of the transaction between the plaintiff and the infant; it merely says that this was a "summary process upon an open account, for a frock coat furnished by the plaintiff, a tailor, to the defendant's ward." There was an interrogatory annexed to the process, under the local statute, requiring the defendant to answer on oath, whether he had not promised the plaintiff's attorney, after the account had been placed in his hands for collection, to pay the debt, if he should be indulged for a short period. He refused to answer on two grounds, one of which was that if such a promise had been made, it was void under the statute of frauds. In the court below the objection was overruled, on the ground that the promise "was an admission, both that the debt had been properly contracted by the ward, and that he himself had funds in hand to meet it;" and the plaintiff had judgment under the statute, in consequence of the defendant's refusal to answer.

§ 263. The defendant moved in the Court of Appeals to set aside the judgment. The motion was denied, Johnson, J., saying, that assuming the affirmative of the question to be true, the case was that the coat was furnished to the ward without the defendant's order, and that he subsequently promised to pay the value, in consideration of indulgence; and that where there was no liability on the part of the person for whom the promise was made, the promise was original. He added: "It may, I think, be well questioned, whether an infant having a guardian would, under ordinary circumstances, be himself liable

expenses of repairing his dwelling house, although the repairs were necessary for the prevention of immediate and serious injury to the house; the court holding that if such repairs are needed, a guardian should be appointed to make them.

even for necessities furnished him. But there is clearly nothing in this case which would bind him; and according to the rule, the promise of the defendant was original and binding on him," citing *Harris v. Huntbach*. The motion was therefore denied. It would seem, from the remarks which we have quoted, that the pleadings or the evidence disclosed something, relating to the original transaction between the plaintiff and the infant, which the reporter has omitted; probably that the coat was furnished on the credit of the defendant, but without his authority; especially as the decision of the court below proceeded upon that ground, and the reason there assigned was ample to sustain the action. (k)

§ 264. In *Chapin v. Lapham*, 37 Massachusetts (20 Pickering), 467, A. D. 1838, the defendant had requested the plaintiff to assist his minor son, whenever he should need any assistance, in a business which he was carrying on; and had promised to indemnify him for any liabilities which he might incur, and any assistance which he might render. Upon the faith of this promise, the plaintiff had signed a note with the son, and for the latter's accommodation, which he had subsequently paid; and now he brought this action to recover the amount so paid. A verdict was rendered for the plaintiff, under a general charge that the

(k) The case apparently very nearly resembles that of *Law v. Wilkin*, 6 Adolphus and Ellis, 718, A. D. 1837. There the action was brought by a firm of tailors for the value of a suit of clothes, supplied to the defendant's son, a boy at a boarding school. It appeared that the boy was in want of clothes, but there was no evidence to show that the father had ordered this suit. It was also shown that when the boy went home for the holidays, he took the clothes with him; but "was not wearing them;" and he returned to school with them; but there was no direct proof that the defendant had seen them. The plaintiffs were nonsuited, and the court set aside the nonsuit and ordered a new trial, partly on the ground that it appeared that the father had not made proper provision for the son. But Lord Denman, C. J., and Patterson and Coleridge, J. J., also held that the presumption was that the father saw the clothes during the vacation; and as he made no objection, an authority might, for that reason, be implied.

promise was not within the statute of frauds; and the case came on to be heard, upon exceptions to that and other portions of the charge. Shaw, C. J., delivered the opinion of the court, overruling the exceptions. Upon the point whether the promise was within the statute, after saying that when the whole credit was given to the person making the promise, it is original, he added: "In the present case we think the whole credit was given by the plaintiff to the defendant.. The son of the defendant was a minor, and not liable to any action by the plaintiff for the money paid on his account, on the joint and several note signed by the plaintiff, in pursuance of the defendant's request. The undertaking and promise of the defendant, therefore, was not collateral to any promise of the son; but was separate, independent and original." (l)

§ 265. On the other hand, the case of *Clark v. Levi*, 10 New York Legal Observer, 184, decided in the New York Common Pleas, A. D. 1851, is an authority for holding a promise to respond for an infant's contract to be collateral; for although in the particular case, it was conditional by its terms, it is believed, that within the principles governing verbal contracts of that character, the rule is the same, in this connection, whether the promise was absolute or conditional. (m) The plaintiff had sold goods to the defend-

(l) This is all in the opinion material to the point under consideration; and if we understand it rightly, it means no more than that the infancy of the principal debtor, was a circumstance to show, that in fact credit was not given to him; rather than that it rendered the contract necessarily original. It is true, that the infant had assumed to contract upon his own credit, but not with the plaintiff. As between the plaintiff and the defendant, the result would have been the same if the principal debtor had been an adult. It will appear hereafter, (chapter xiii,) that this is the first of a series of Massachusetts cases, which finally settled the rule in that State, that a promise to indemnify the promisee for becoming surety for the third person to a fourth person, who was not a party to the contract, is not within the statute. Still the Chief Justice failed in this case to lay down that principle distinctly, saying that it was not necessary to decide it; and placed the decision entirely upon the question of credit.

(m) Chapter vii, article iii.

ant's son, at six months' credit, upon the defendant's promise to be responsible and to pay for them, if the son did not; the son was under age, and the plaintiff had refused to trust him because he was an infant; but finally let him have the goods, upon the defendant's promise as above stated. The defence was that the promise was within the statute. The plaintiff had judgment, which was reversed on appeal. Ingraham, First Judge, delivering the opinion of the court, held, that the promise was not taken out of the statute of frauds by the infancy of the son; because "the contract with the infant was a good contract, which he could enforce on his part; and which was only voidable, if he saw fit to avail himself of his personal exemption; but until the defence of infancy was made, the contract was otherwise valid." The learned judge added, that it was evident that the defendant did not intend or agree to be the principal debtor; this was apparent, not only from the circumstances proved in evidence, but from the terms of the contract; the whole credit was not given to the defendant. "If," he continued, "the promise had been, to do what was asked of the defendant in the first instance, viz., to indorse the note of Joseph, there could be no doubt that such a promise would be void." The case of *Harris v. Huntbach* was distinguished from the one at bar, on the ground that there it did not appear that the infant had made any contract, or that there was any privity between the plaintiff and him.

§ 266. And the recent case of *Dexter v. Blanchard*, 93 Massachusetts (11 Allen), 365, decided A. D. 1865, although the question arose upon a promise to pay a debt antecedently contracted by an infant, apparently covers the whole subject of the present discussion. It was an action "upon an oral promise by the defendant, to pay to the plaintiff a bill for the hire of horses and carriages, and for injury to a wagon." At the trial, "the plaintiff offered to prove that the horses and carriages were hired, and the injury done, by the defendant's minor son, to whom the credit therefor was given;" and that in consideration of

forbearance to trouble the son, while he was ill, the defendant promised to pay the debt. The judge ruled that the action could not be maintained, and a verdict was rendered for the defendant. The Supreme Court overruled an exception to this ruling, Bigelow, J., delivering the opinion, which, upon this branch of the case, is as follows: "The fallacy of the argument urged in behalf of the plaintiff, lies in the assumption, that there was in fact no debt due from the son of the defendant, because he was a minor at the time he undertook to enter into a contract with the plaintiff. A debt due from a minor is not void; it is voidable only; that is, it cannot be enforced by a suit at law against the contracting party, on plea and proof by him of infancy. But it is voidable only at the election of the infant, and until so avoided it is a valid debt. Nor can a third person avail himself of the minority of a debtor, to obtain any right or security or title. Infancy is a personal privilege, of which no one can take advantage but the infant." "The effect of the doctrine contended for by the counsel for the plaintiff would be, that a verbal agreement to answer for the debt of another would be valid, if it could be shown that the original contracting party could have established a good defence to the debt, in an action brought against him. We know of no principle or authority on which such a proposition can be maintained. It certainly would open a wide door for some of the mischiefs which the statute of frauds was designed to prevent." (n)

(n) As germane to this question, we refer also to the cases of Haine's Administrator v. Tarrant, 2 Hill (South Carolina), 400, A. D. 1834, and Conn v. Coburn, 7 New Hampshire, 368, A. D. 1834, (each of which was an action to recover from an infant, the amount paid by the plaintiff, to take up a promissory note, which he had signed with the infant, as his surety, for necessities furnished to the infant); and to Randall v. Sweet, 1 Denio (New York), 460, A. D. 1845, where a stranger to the demand, at the request of the infant, had paid the infant's note, given upon a like consideration. In each of these cases the creditor was allowed to recover. In Conn v. Coburn, it was expressly conceded, that the note was voidable, and that it did not cancel the debt until it was paid; and Parker, J., delivering the opinion of

§ 267. These are, as far as we can ascertain, the only reported cases upon this subject; (o) and we think that the weight of authority, as well as of argument, is very decidedly in favor of the ruling, that a promise in aid of that of an infant, is within the statute of frauds, precisely as if the infant was an adult.

§ 268. Here we take leave of the cases governed directly by the third general rule; but by no means of the principle embodied in the rule. On the contrary, we shall find it underlying many of the rules upon which depends the validity of a verbal promise relating to an antecedent debt or liability of a third person. Not unfrequently the very language of this favorite rule is used, as a test by which to determine the application of the others; and in some cases this rule has been erroneously allowed to supercede the one, by which the validity of the promise should have been determined.

the court, says: "If the infant is not liable upon the note, as he would not be if he elected to avoid such liability, an *assumpsit*, upon the delivery of the goods, must be considered as subsisting against him; and the note of the surety be regarded as collateral security for the payment."

(o) *Kirkham v. Marter*, 2 Barnewall and Alderson, 613 (ante §§ 124, 133,) is sometimes supposed to relate to this question. If it has any bearing upon the validity of a verbal auxiliary undertaking in behalf of an infant, it merely proves that such an undertaking is within the statute, when the infant is liable. But there is nothing in the case to show that the defendant's son was an infant.

CHAPTER NINTH.

CASES WHICH ARE NOT WITHIN THE STATUTE, ALTHOUGH THE THIRD PERSON AND THE PROMISOR BECAME LIABLE FOR THE SAME DEBT, BECAUSE THEY WERE NOT SO LIABLE AT THE SAME TIME. THE SUBJECT COMMENCED WITH THOSE CASES, WHERE THE EXTINGUISHMENT OF THE THIRD PERSON'S LIABILITY RESULTED FROM SOME ACT OR OMISSION OF THE PROMISEE, OTHER THAN AN EXPRESS DISCHARGE.

§ 269. Having thus completed the examination of those cases, where the liabilities of the promisor and of the third person did not concur, for the reason that the third person had assumed no liability corresponding with that of the promisor, at the time when the promise took effect, we now come, in pursuance of the classification indicated in the second chapter, to those where the failure of the two liabilities to concur, proceeded from the fact that the person primarily owing the debt or the duty, had been discharged therefrom, before the undertaking of the new promisor took effect. These form the second subdivision of the fourth class of cases not within the statute, because the terms of the statutory description of the promises to which it applies are only partially satisfied,^(a) and they are governed by the fourth general rule, namely :

RULE FOURTH.

A promisee to assume an antecedent liability of a third person is without the statute, if the third person's liability had become extinct, at the time when that of the promisor came into existence.

§ 270. The cases governed by this rule are also very numerous ; and they arrange themselves into several distinct groups or sub-classes, depending upon the manner in which the discharge of the third person was effected,

(a) Section 70.

and presenting various incidental questions, which relate chiefly to the sufficiency of the discharge, or of the evidence to establish it. After disposing of some preliminary matters relating to all these groups, we will consider in this chapter those cases which possess in common the feature, that the third person's discharge resulted from some act of the promisee, done at the request of the promisor, but without any agreement to that effect with the person discharged; reserving till the next chapter the examination of those, where the discharge resulted from an agreement, to which the promisor, the promisee, and the third person were all parties.

ARTICLE I.

Origin and correct definition of the rule; in what cases an exoneratory agreement to discharge the third person, or to do some act which will operate to discharge him, will satisfy it.

§ 271. The suggestion that the statute does not apply to cases where the third person's liability had become extinct at the time of the promise, is believed to have been first made in the year 1766, by Sir Fletcher Norton, commenting upon *Read v. Nash*, 1 Wilson, 305, in the course of his argument for the plaintiff in *Williams v. Leper*, 3 Burrow, 1886.(a) But the earliest case where we find any such principle distinctly suggested from the bench, is *Anstey v. Marden*, 4 Bosanquet and Puller (1 New Reports), 124, decided in the Common Pleas in the year 1804, already cited at considerable length in another connection.(b) There, as was mentioned when the case was formerly cited, Sir James Mansfield, the Chief Justice, said that one of the grounds of his ruling at the trial was that he did not see "how one person could undertake for the debt of another, when the debt, for which he was supposed to undertake, was discharged by the very bargain." And he seems to have retained that impression, after the argument of the rule nisi; although he ultimately fell in

(a) See ante, § 130, and post § 577, 578.

(b) Sections 118 and 119.

with the conclusions of the other judges, who discharged the rule upon a ground, which seems to be wholly inconsistent with the application of that doctrine to the case, then before them.

§ 272. This suggestion of the Chief Justice provoked much cotemporaneous comment; and Mr. Roberts, whose Treatise on the Statute of Frauds was published soon afterwards, condemned it in unqualified terms. (c) But fourteen years after the decision in *Anstey v. Marden*, the case of *Goodman v. Chase*, which will presently be given at length, was decided in the King's Bench, before Lord Ellenborough and his associate justices; wherein that principle was distinctly promulgated as the ground

(c) The following extract contains the substance of his argument against the principle: "The promise mentioned by the statute is as well that whereby a man undertakes to answer for the *debt*, as for the *default*, of another; and although where the original party was liable to the *performance of some act* (to which case the words *default* or *miscarriage* seem properly applicable), the promise may be construed in the limited sense of an *alternative* undertaking only; yet such interpretation will be too narrow where the promise is to *pay the debt of another*. To answer for another man's debt seems to be a phrase extending as well to promises to pay another's debt, where the promise is made in consideration of an instantaneous discharge of the party originally liable, so as to substitute the promisor in his place as the *only* debtor, as where the engagement is only meant to be in the alternative; and as the greatest lawyers have, for a series of years, strongly declared their conviction of the expediency of a liberal construction of the statute, there does not appear to be any just ground for confining this clause to the case of such promises only, which suppose the liability of the original debtor to remain. Where, indeed, there was no previously existing debt, as where the undertaking arises upon the furnishing and delivery of goods by a trader to a third person, to place such case within the reach of the statute, it is necessary that the deliverer should become liable; in such case, therefore, the liabilities of the party undertaken for, and the party undertaking, must necessarily exist together. But if I undertake to satisfy the debt of a person already indebted, in consideration of his instantaneous release, there seems to be no good reason for saying that this is not a promise to answer for the debt of another, within the reason and contemplation of the act of Parliament." Roberts on Frauds, pp. 224, 225. *Case v. Barber*, T. Raymond, 450, A. D. 1681, appears to be an authority in support of Mr. Roberts's views.

of the decision. Since that time, it has been universally acknowledged, as the true rule of construction of the statute, by all the English courts and text writers; and from England it has travelled to the United States, where it has now become equally well settled, and although some ill-considered rulings to the contrary may be found scattered through our reports, our courts are practically unanimous in recognizing it.(d)

§ 273. The rule is frequently stated, as though it was confined to cases where the discharge of the third person, or the act from which his discharge resulted by operation of law, constituted the *consideration* of the promisor's undertaking. In practice such is almost always the fact; but it is believed that the principle does not depend upon that circumstance; and that all that is required is, that the two liabilities should not exist simultaneously. If we are correct in this conclusion, the consideration of the discharge and of the promise may be entirely distinct.

§ 274. But while it seems impossible to state any satisfactory reason for this rule, other than that the two liabilities did not at any time concur, it has happened that in nearly every English case of this class, there has been a period of time, more or less extended, during which the undertaking of the promisor was for some purpose a binding contract, and yet the third person was not actually discharged. This feature of the cases at once provokes the inquiry, whether an executory agreement on the part of a creditor to discharge his debtor, or to do some act from which his discharge will result by operation of law, will take out of the statute a stranger's promise to pay the debt. The question is full of embarrassment; and we can make only an experimental effort to answer it.

(d) Per Lipscomb, J., *Tompkins v. Smith*, 3 Stewart and Porter (Ala.), 62, A. D. 1832; *Saxton v. Landis*, 1 Harrison (N. J.), 302 (1838); per Wilson, C. J., *Evans v. Lohr*, 2 Scammon (Illinois), 511 (1840); per Whitman, C. J., *Rowe v. Whittier*, 21 Maine, 550 (1842).

§ 275. Suppose that A and B should agree, that at some future day, A will pay B the amount of a debt which C owes him, and that upon receiving the money B will discharge C from the debt; it is manifestly absurd to say, that the circumstance that B expressly agrees to discharge C, will take the promise out of the statute, when the fulfilment of A's promise would extinguish the debt, without any special agreement to that effect. Doubtless no one will deny that in the case put, the statute avoids the agreement, unless it was in writing. The same result would follow, if A's promise was to pay a smaller sum than the amount of the debt; or to do some specific act in lieu of paying money, as, for instance, to give a note for all or part of the debt. In all such cases there may be two liabilities, which can be enforced by concurrent actions; for if B should, at the appointed day, tender a discharge of C, and demand fulfilment of A's contract, as a condition of its taking effect, he could maintain an action against A for breach of his promise, without affecting his original remedy against C. And it would seem, that the application of the statute depends upon the fact, that both these actions might be maintained.

§ 276. On the other hand, suppose that the agreement is that A will pay B a certain sum at a future day, provided that B shall have previously discharged C; and B agrees that he will discharge C accordingly. In this case, as B can maintain no action against A, until he shall have actually discharged C, there cannot be two concurrent actions. It would therefore seem, that in such a case, the promise is not within the statute. And we suspect that in all cases, where the original debtor's discharge was not fully accomplished, till after the making of the new agreement, the true test of the application of the statute will be found in the answer to the inquiry, whether the terms of the agreement were such, that the creditor could, in any contingency, maintain an action thereon, without previously discharging his debtor. Although this distinction is very fine, and cases can easily be suggested,

where the course of the dividing line could be detected with difficulty, there seems to be no other satisfactory method of defending some of the cases upon principle, or of reconciling them with others. As this question is of considerable practical importance, and the foregoing distinction has never, as far as we have noticed, been expressly taken, we shall recur to the subject again, after examining the principal English cases, where the question is presented.^(e)

§ 277. Proceeding, therefore, to the consideration of the cases, where the extinguishment of the third person's liability resulted from some act of the promisee, other than an express discharge, tendered to and accepted by the third person; we find that in some of them, where the third person's liability was in the form of an indebtedness, ascertained and payable, the discharge resulted from some act or omission of the promisee, whence the law presumes a satisfaction, and, without considering the question of actual intent, declares the debt to be cancelled. In others, where the third person's obligation was a contract to perform some act, other than the payment of a debt, or whereby a debt would be created upon a future contingency; the promisee, without any express discharge of the obligation, has pursued such a course with respect to the subject matter of the contract, as to indicate his intention to abandon it altogether; and to preclude him from enforcing it against the other party. Each of these descriptions of cases will be considered in its turn.

(e) See the note to *Bntcher v. Stuart*, post § 284.

ARTICLE II.

Where the discharge of the third person's debt arose by operation of law, in consequence of some act or omission of the promisee, without his express assent thereto.

- (1) *Where the promisee discharged the third person from arrest under a capias ad satisfaciendum.*

§ 278. It is well settled, that where the defendant in a judgment is taken upon a *capias ad satisfaciendum*, such capture amounts, for the time being, to a satisfaction of the judgment; and the defendant's subsequent discharge from custody, by the consent of the plaintiff, operates in law as an extinguishment of the debt, although it may have been merely temporary, and the facts may clearly indicate that the intention of both of the parties was quite otherwise. The principle, that an extinguishment of the original debt, suffices to take out of the statute, the promise of another person to pay it, was first settled in England, in a case where the debt was extinguished, in consequence of such a discharge.

§ 279. The case referred to, which was decided in the King's Bench in the year 1818, is *Goodman v. Chase*, 1 Barnewall and Alderson, 297. There it appeared that the plaintiffs, having recovered a judgment against the son of the defendant, sued out a *capias ad satisfaciendum*, under which the son was arrested; that he applied to the plaintiffs' attorney for time to get the money, and in the mean time to be released from custody; to which the attorney consented, provided the defendant in this action would sign a written paper, which the attorney delivered to the officer for the purpose, undertaking that he would put his son into custody of the sheriff by the next Saturday, and in default of so doing that he would pay the damages and costs. The officer went with the paper to the defendant, and informed him of what the attorney had said; whereupon the defendant signed the paper, and the officer returned it to the attorney, by whose consent the son was then discharged from custody; but he did

not return into custody by the Saturday. Subsequently however, and on the return day of the writ, the son offered to surrender himself in discharge of the defendant's agreement; but the plaintiffs' attorney refused to discharge the defendant on those terms; whereupon the son offered to surrender himself to the sheriff, who refused to receive him. In an action upon the promise, the plaintiffs had a verdict, subject to the opinion of the court; and the cause was twice argued, the first argument turning chiefly upon the question, whether the writing was sufficient to satisfy the statute. Upon the opening of the second argument, Lord Ellenborough, C. J., said that it was unnecessary to discuss the question of the sufficiency of the writing, as it appeared to the court, that the debt had been discharged, by the plaintiffs permitting the younger Chase to go out of custody; and he called upon the defendant's counsel, after hearing whom, he pronounced the judgment of the court as follows: "By the discharge of Chase, junior, with the plaintiffs' consent, the debt, as between those two persons, was satisfied. No case can be cited, in which such a discharge has not been held quite sufficient. Then if so, the promise by the defendant here is not a collateral but an original promise, for which the consideration is the discharge of the debt, as between the plaintiff and Chase, junior. That being so, it becomes wholly unnecessary to consider the question, arising out of the construction of the fourth section of the statute of frauds."—Judgment for the plaintiff.

§ 280. In *Lane v. Burghart*, 6 Jurist, 125, decided A. D. 1841,(a) it was held, that where the debtor is in fact discharged, the undertaking is original, although it assume the form of a guaranty that he shall pay the debt; as he will be regarded in such a case as the mere agent of the promisor. The validity of the promise under the statute

(a) 8 C., 1 Gale and Davison, 311, and 1 Queen's Bench Reports (Adolphus and Ellis, New Series), 933.

was not directly involved in the decision, but the case is nevertheless quite in point upon that question. (b)

§ 281. The more recent case of *Butcher v. George Drummond Stewart*, 11 Meeson and Welsby, 857, decided in the Court of Exchequer, A. D. 1843, (c) is remarkable, not only because it holds, that upon a question of this kind, the regularity of the execution and of the arrest cannot be inquired into; but because it is, as far as we know, the only reported decision, expressly holding that the statute

(b) In this case, the plaintiffs had caused one Bacon to be arrested on a ca. sa., issued upon a judgment in their favor; and the defendant, on the 17th of November, 1838, gave a written agreement addressed to them in these words: "(Title of the judgment.) Gentlemen—In consideration of your discharging the defendant out of custody in this action, I undertake that he shall pay the debt due to you, viz.: 275*l.* 12*s.*, together with interest, by four equal half-yearly instalments, the first instalment to commence and be made on the 17th day of May, 1839." Within a few days after receiving this agreement, the plaintiffs discharged Bacon from custody. In an action upon this agreement, the defence was that on the 19th of April, 1839 (the date of the fiat), the defendant became bankrupt, and obtained his discharge in the following August; and the question was whether the debt could have been proved before the commissioners and valued, under a clause of the statute, providing in substance, that a debt payable on a contingency might be so proved; it being also provided that all debts which might be proved before the commissioners, should be barred by the certificate. On the part of the plaintiffs it was contended, that this was not a debt payable by the defendant on a contingency, nor in fact any debt of the defendant; but only a liability to damages, if Bacon should fail to pay, and that Bacon had not made default at the date of the fiat. But a verdict having been rendered for the plaintiffs, with leave to the defendant to move to enter a nonsuit, a rule nisi to enter a nonsuit was made absolute. Lord Denman, C. J., delivering the opinion of the court, said: "It was argued on the authority of *Goodman v. Chase*, that this undertaking was an original one, on the part of the bankrupt, to pay the amount of the sum that had been due from Bacon; and though in form it was an undertaking that Bacon should pay, yet at most it was an undertaking, by the defendant, to pay by the hands of Bacon. On consideration we agree that this is correct; the unpaid instalments might therefore have been estimated and proved under the commission. It follows that the defendant's certificate is a bar to the action."

(c) S. C., 12 Law Journal, N. S., Exch., 391; 7 Jurist, 774; 1 Dowling and Lowndes's Practice Reports, 308.

does not apply, to a promise to pay a third person's debt to the promisee, where the consideration of the promise is an executory contract to do an act, whence his discharge will result. The action was *assumpsit*; and the declaration alleged in substance the recovery of a judgment against one Robert Steuart; the arrest of Robert by virtue of a *capias ad satisfaciendum* issued thereon; that while Robert was in custody, "in consideration that the plaintiff would procure the release of the said Robert Steuart, from and out of the said custody under the said writ," the defendant promised, etc. (according to the writing produced at the trial); that the plaintiff, confiding on the said promise, did then "procure the release of the said Robert Steuart from and out of the said custody," etc.; concluding with an averment of a breach and of damages. Upon the trial, the plaintiff proved the recovery of a judgment, and the arrest of Robert Steuart, as alleged in the declaration; that on the next day George Drummond Steuart, the defendant in this action, entered into a written undertaking in the form of a letter to the plaintiff, in which, after reciting the title of the judgment, he stated that "in consideration of your having released the above named defendant from custody," he agreed that within one month from the date of the writing, he would pay the plaintiff 500*l.*, and hand him a bond for the remainder of the debt, interest and costs, executed by the defendant, the said Robert, and some other responsible person, payable at periods particularly mentioned.

§ 282. On the receipt of this writing, and at the same interview, the plaintiff's attorneys gave an order to the sheriff, to discharge Robert Steuart on payment of the fees, "judgment having been satisfied." The fees were immediately paid by the defendant; and the sheriff's officer then said that Robert was free as to that suit; but before discharging him from actual custody, he must ascertain if there were any detainers lodged against him; and it being discovered that there were two detainers, founded upon other judgments, the sheriff refused to discharge him.

At the time when the writing was executed, and the order given, Robert Steuart had actually taken out a summons to be discharged from custody as to this action, on the ground of privilege, as a member of Parliament; and at a subsequent hour of the same day, he procured a judge's order to be discharged from this execution and from the detainers, on that ground; and the sheriff returned the poundage fees. It had been agreed, however, that the discharge should not affect the defendant's undertaking. It appeared also that the execution was irregular, it having been issued to Middlesex without any previous writ having been issued to Kent, where the venue was laid.

§ 283. The defendant objected to a recovery, on the ground that the promise was void under the statute of frauds, and because it was without sufficient consideration; and also upon other grounds, presenting questions of variance between the declaration and the proofs, only one of which need be noticed here. It was substantially, as developed in the argument and the opinion, that whereas the declaration alleged that the consideration of the defendant's promise, was a promise on the part of the plaintiff to procure the release of Robert Steuart, the proof consisted of a writing, reciting that such a release had already been made. There was a verdict for the plaintiff, subject to the opinion of the court, for the full amount of the debt and interest, to be reduced to 500*l.*, etc., upon delivery of a bond, etc., with a consent that the court might draw any inferences of fact. The opinion of the Court delivered by Parke, B., and concurred in by the other Barons present, was in favor of the plaintiff upon all the points raised; and judgment was accordingly entered in his favor.

§ 284. With respect to the question, whether the promise was void under the statute of frauds, the opinion said that if the case was within the statute, it would be very doubtful whether the writing was sufficient. "But," the learned

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Baron proceeded, "it appears to me that this is an absolute promise, in consideration of the agreement to discharge the defendant from execution. It is not a promise to answer for the debt, default or miscarriage of another; but is a promise to pay a debt, in the event of the other contracting party doing a certain act. It is therefore within the decision of *Goodman v. Chase*, and does not require a memorandum in writing to satisfy the statute of frauds." The point of variance, which we have noted, was disposed of by saying that the plaintiff's engagement recited in the memorandum, might be construed as prospective; that is to say, it was not inconsistent with the words, to construe them as meaning that the defendant would pay the 500*l.*, and deliver the bond at the expiration of a month, in consideration of the plaintiff having *then* released Robert Stuart. It was further held that the irregularity in the issuing of the writ was not material; nor was it important to inquire whether Robert's privilege protected him from arrest; for the questions affected only the consideration of the defendant's promise, and if they should be decided against the plaintiff, there was ample consideration in the plaintiff's consent to an immediate discharge, without putting Robert to his motion. (d)

(d) The extract from Lord Wensleydale's remarks, quoted verbatim in the text, is taken from the report in the 11th of Meeson and Welsby. The Jurist makes the corresponding portion of his opinion commence thus: "But it appears to me an absolute promise to discharge a defendant from execution, and falls within the decision of *Goodman v. Chase*, that *such a promise* does not require," etc. With this absurd version the report of Dowling and Lowndes agrees. The Law Journal, equally incorrect in another direction, makes his Lordship say "that this is *not* an absolute promise to discharge a defendant from execution," etc. But the four reports coincide exactly, in attributing to him the expression, that the defendant's promise was "to pay a debt *in the event* of other contracting party doing a certain act," and this coincidence, with the decisions upon the questions of regularity and of variance, (including another question of variance, not noticed in the text, which was decided upon grounds entirely similar,) leave no room for doubt that his Lordship did intend to hold, that an executory contract to discharge a debt, would sustain a stranger's verbal promise to pay part of the debt in money, and to join with the debtor in a bond for the remainder. This is

§ 285. The rule that a voluntary discharge of a defendant, arrested on a *capias ad satisfaciendum*, releases the

the question discussed in §§ 275, 276, ante, to which we now recur, after examination of the English cases where it arises, with the exception of *Emmet v. Dewhurst*, 3 Macnaghten and Gordon, 587, which our arrangement of subjects required us to place in the next chapter. (See § 342.) In the earliest of these, *Goodman v. Chase*, ante, § 279, it will be observed, that as the sheriff's officer was the agent of the plaintiff's attorney, and took the defendant's agreement in that character, upon a promise of the attorney to discharge the judgment debtor; which was fulfilled only after a short interval of time, it may be made to appear, by a very minute subdivision of time, that the plaintiff's executory agreement formed the consideration of the defendant's agreement, which was sustained as being founded upon the discharge. But the interval was so short, and the transactions were so closely connected with each other, that doubtless the discharge and the agreement would be regarded in law, as taking effect simultaneously. In *Butcher v. Steuart* the facts would easily admit of a construction, which would also make the discharge and the agreement take effect simultaneously; but the court precluded that construction, by its decision upon the questions of variance. To avoid these, it was held that the consideration of the defendant's agreement was executory. But the construction put upon it was not such, as to enable the plaintiff to maintain his action, upon an allegation of tender of performance; on the contrary the court held, that the agreement meant that the defendant would pay the money and hand over the bond, at the expiration of the month, "in the event" that the plaintiff had then discharged his original debtor. So that although the promise was made, while the original debtor continued to be liable, there was no obligation to perform it, till he should be discharged; and therefore there was no moment of time, when the defendant and the original debtor were concurrently liable to separate actions. On the other hand in *Emmet v. Dewhurst*, where it was held that the promise was within the statute, the agreement provided that the defendant's guaranty notes, and the discharge by the bank, should be delivered simultaneously, the one forming the consideration of the other; so that upon an allegation of tender of a discharge and demand of performance, the plaintiff's bank could have maintained an action for damages against the defendant, without impairing its remedy against his brother. This distinction runs very fine; but it seems to afford the only method of reconciling the cases, and to furnish the true test of the application of the statute, to executory agreements of this character. The same distinction will remove an apparent inconsistency between the more modern cases, and *Chater v. Beckett*, 7 Term Reports, 201, A. D. 1797; *Gaunt v. Hill*, 1 Starkie, 10, A. D. 1815; and the reasoning of the court, particularly of *Chambre, J.*, in *Anstey v. Marden*, 4 Bosanquet and Puller, 124.

debt, is laid down in numerous American cases; but there appears to be no reported decision, where such a discharge has been expressly held to take out of the statute of frauds, a stranger's promise to pay the debt. The principle, however, abundantly appears in the cases cited under the other subdivisions of this chapter. (e)

(2) *Where the promisee discharged a levy upon the third person's goods, which had been made under a fieri facias or a distress warrant.*

§ 286. Where a fieri facias or a distress warrant has been levied upon goods sufficient in amount to discharge it, the general rule is that the debt is suspended, and it is even said in some cases that it is extinguished. (f) There is accordingly considerable force in the argument, that a promise to pay the debt, made by a stranger, in consideration of the release of the goods levied on, is not within the statute; at least if the value of the goods equals the amount of the debt.

(e) In *Cooper v. Chambers*, 4 Devereux (North Carolina), 261, the original debtor had been arrested upon a ca. sa., and was discharged in consideration of the defendant's promise to "see the debt paid in trade;" but although it was held that the promise was not within the statute, the court assigned another reason for its decision, namely, that "there was a new and original consideration of benefit or harm moving between the newly contracting parties." It was said that when the plaintiff discharged the original debtor, "he was entirely freed from the debt and the defendant became the debtor," but this was mentioned only to show, that although the defendant derived no benefit from the promise, the plaintiff suffered harm "by giving up those advantages with which the law had invested him to coerce the debt." See also *Rice v. Barry*, 2 Cranch, C. C., 447, cited hereafter. For the general rule that a debt is discharged by the defendant's release from arrest on a ca. sa., see also, among other cases, *Palethorpe v. Lasher*, 2 Rawle (Pennsylvania), 272; *Lathrop v. Briggs*, 8 Cowen (New York), 171; *Ransom v. Keyes*, 9 Cowen, 128; *Howe v. Buffalo, etc., R. R. Co.*, 38 Barbour (New York), 124.

(f) *Mountney v. Andrews*, *Croke Elizabeth*, 237; *Clerk v. Withers*, 2 Lord Raymond, 1072, 11 Modern, 34, Holt, 646, and 1 Salkeld, 322; *Ex parte Lawrence*, 4 Cowen (New York), 417; *Jackson v. Bowen*, 7 Cowen, 13; *Ladd v. Blunt*, 4 Massachusetts, 402.

§ 287. In *Edwards v. Kelly*, 6 Maule and Selwyn, 204, A. D. 1817, (g) it was held that the defendants' promise to pay the amount of the rent in arrear, was not within the statute, where a distress warrant had been levied on the goods of the tenant, and they were surrendered to one of the promisors in consideration of the promise. The four judges concurred in the decision, for a reason which properly brings the case within another class; but two of them also thought that the promise should be sustained, because the debt was suspended by the distress. Bayley, J., said that after the plaintiff had distrained, the tenant was no longer indebted, and that the statute "was aimed at cases where a debt being due from one person, another engaged to pay it for him; but here, for the reason above stated, at the time when the promise was made, the debt was not owing from the tenant." And Holroyd, J., also said, that as the tenant might have pleaded the distress, in an action for the rent, the debt was for the time suspended; and the promise was therefore to pay "a debt, which at that time did not exist as a debt of another."

§ 288. The facts, in *Slingerland v. Morse*, 7 Johnson (New York), 463, A. D. 1811, were substantially like those in *Edwards v. Kelly*, as far as they raised this question; but the goods were delivered to the tenant. There also the court held the promise to be original, upon the ground which chiefly controlled the decision in the former case, although it is now ranked among those where the principle was erroneously applied. (h) But the point now under consideration was not suggested.

(g) Cited more at length in chapter sixteenth.

(h) It is true that Comstock, C. J., in his opinion in *Mallory v. Gillett*, 21 New York, 412 (on page 424), attempted to reconcile *Slingerland v. Morse* with the cases which were correctly decided, upon the hypothesis that the goods were delivered to the defendants, and the debt was discharged. But as we read the case, especially with the assistance of the report after the second trial, in 8 Johnson, 370, the goods were delivered to the tenant; and the court assumed that the debt was not discharged.

§ 289. Among the American cases on this subject, the decision in *Tindal v. Touchberry*, 3 Strobbart (South Carolina), 177, A. D. 1848, 'was partly put upon this ground. The levy was under a domestic attachment; and in consideration that the plaintiff, who was the officer holding the attachment, would deliver the property to the debtor in the attachment, the defendant verbally promised that the property should be returned the next day, or he would pay the debt; and it was held that he was liable for the value of the property, it being less than the debt. The decision was principally put upon the ground, that the debtor assumed no liability for the property; on the contrary, he was resisting the levy; but the court also said that where the original debtor was discharged, the promise was within the statute, and that "the proceeding by attachment is a proceeding in rem, and is like the seizing of goods under a distress warrant, or under execution; a presumptive satisfaction, until the goods seized are sold or are accounted for." (i)

§ 290. But most of the American cases, where the defendant's promise was made, in consideration of the surrender of a levy upon the goods of the original debtor, were decided upon the theory, which long prevailed here, that the statute does not apply, if the promisee surrendered to the debtor a lien, available for the collection of his debt, even though the debt remained in full force. Indeed this theory was regarded as a corollary from, or a principle concurrent with a much broader doctrine; namely, that whenever the promise was founded upon a new and original consideration, of benefit to the promisor or harm to the promisee, it was without the statute. (j) There are

(i) It was held in *Martin v. England*, 5 Yerger (Tennessee), 313, A. D. 1833, that a verbal agreement, very similar in its character to that which was upheld in *Tindal v. Touchberry*, was void; but the decision was put upon the ground that the Tennessee statute, relating to a bond for the delivery of property levied upon, avoided a verbal agreement to that effect. The statute of frauds was not alluded to in the opinion.

(j) These doctrines, both of which are now exploded, will be examined in the seventeenth chapter.

consequently but few cases, where the effect of the discharge of such a levy, has been considered in connection with the principle now under examination. But we find a series of decisions in the New York Supreme Court, which may perhaps be regarded as of authority, upon the subject of this discussion; although in each of them it is quite doubtful, whether any such question was ever in the mind of the court.

§ 291. The first of these is *Skelton v. Brewster*, 8 Johnson, 293, A. D. 1811. There it is said in the report, that the plaintiff recovered a judgment and "took out an execution for twenty-five dollars against W. S.;" and that W. S. delivered all his household goods to the defendant in this action, who thereupon, "in consideration that the plaintiff would discharge the said W. S. from the execution, promised to pay the plaintiff twenty-five dollars." A judgment for the plaintiff, rendered in a justice's court, was affirmed upon certiorari, the Supreme Court saying that the promise was not within the statute, because it was founded "on a new and distinct consideration, which was the delivery of the goods of such person and the plaintiff's discharge of the judgment." It would seem from the reporter's statement of the facts, and the language of the court, that the execution was against the person, rather than the property of the original debtor. But in a subsequent case in the same court (*k*) it was said that the execution was against the property. If so, this case is perhaps an authority for the proposition, that the discharge of a levy upon goods, by virtue of an execution, will suffice to take the promise out of the statute; but not, we are inclined to think, for any reason connected with the present discussion.

§ 292. In *Mercein v. Andrus*, 10 Wendell, 461, A. D. 1833, the Supreme Court of the same State granted a new

(*k*) *Farley v. Cleveland*, 4 Cowen, 432, where Savage, C. J. (on p. 437) said that the levy was upon property, and that the distinctive feature of the case was that the original debtor was discharged.

trial, upon exceptions taken by the defendants, to certain rulings of the judge at the trial, upon points not connected with the statute of frauds; but there was also an exception to a ruling, that the defendant's promise to pay a certain sum, being part of the amount for which a judgment had been recovered by the plaintiff against one Reed, was not within the statute, because it was founded upon the release of certain goods of Reed, levied upon under an execution issued upon the judgment. With respect to that exception, Savage, C. J., delivering the opinion of the court, said: "The judge correctly stated to the jury, that where the promise of one person to pay the debt of another, was founded upon the consideration of surrendering property levied on by an execution, the promise was an original undertaking, and need not be in writing to be valid: that it was not within the statute of frauds. Whether the evidence proved such a case was submitted to the jury." (l)

§ 293. But in *Stern v. Drinker*, 2 E. D. Smith, 401, A. D. 1854, the New York Common Pleas expressly held, that the release of a sufficient levy, under an execution against property, would not take a stranger's promise to pay the debt out of the statute. The action was originally brought in a justice's court, and the complaint alleged that the plaintiff had recovered a judgment against one

(l) *Mercein v. Andrus* was also commented upon in 21 New York, 424, 425; where Comstock, C. J., after referring to the fact that what was said upon this point was obiter, because a new trial was granted upon another point, said that if "the charge at the trial and the observation of the Chief Justice assumed, as the law was, that the levy of an execution extinguished the debt, and that the release of the levy remitted the creditor to the new promisor as his only remedy, then the remark was strictly correct." "Such," added the learned Chief Justice, "is probably the true explanation." The principle of this ruling in *Mercein v. Andrus* was also recognized in *Van Slyck v. Pulver*, Hill and Denio, 47, A. D. 1843, but without any explanation of the grounds upon which it rested; the court distinguishing it from the case then at bar, on the ground that upon the most favorable aspect of the testimony, the surrender of the goods was made in consideration of another agreement, and not the one sued upon; so that the latter was nudum pactum.

Nusbaun, and had issued execution thereon, which had been levied upon property sufficient to satisfy it; and in consideration of his abandoning the levy, and delivering the property to the debtor, the defendant undertook to pay the amount of the judgment. To this complaint the plaintiff demurred, and the court below gave judgment for the defendant. Upon the argument of the appeal, it was admitted by counsel on both sides, as it was evidently assumed by the court below, that the promise was not in writing, although the complaint did not so state; and the Common Pleas decided, under the circumstances, to follow the same assumption, denying costs to the plaintiff on the reversal, which was adjudged on account of a technical irregularity. Ingraham, First Judge, delivered an opinion upon the merits; in which he contended that the promise was within the statute, upon the ground, that a new consideration, moving between the promisor and the promisee, would not take a promise out of the statute, where the original debt was not discharged. Here, he said, the promise to pay the amount of the judgment, "did not relieve Nusbaun from liability." "In the present case, the original debt remained; the property was given up to the debtor, and not to the defendant; the defendant received no property, and owed no debt which he promised to pay the plaintiff; but simply in consideration of the plaintiff's relinquishing to the debtor the debtor's property, he promised to pay the debtor's debt. I cannot imagine a promise to pay the debt of another, if the one under consideration is not one." The attention of the court was evidently confined, to the terms of the actual express agreement between the parties; the question whether, under all the circumstances, the law would not imply a discharge of the debt, without an express agreement to that effect, not having been suggested.(m)

(m) The rules laid down by the New York courts, touching the effect of a sufficient levy under a fieri facias, go so far as to make it very nearly equivalent to an arrest under a ca. sa. It has been said in several cases, that such

ARTICLE III.

Where an abandonment of the third person's liability is inferred, as matter of fact, from some act or omission of the promisee, without any agreement to that effect.

- (1) *General principles upon which the application of the statute to this description of cases is determined.*

§ 294. The cases within this class consist almost exclusively of those, where an executory contract had been made between the promisee and the third person, for the performance of services, or the sale of property, to the third person by the promisee, for a reward to be paid to the latter; and the promisor undertook, without any express rescission of the contract, that if the promisee would perform the services, or furnish the articles for which it provided, he would pay, either their value or the contract price. Unless the circumstances are such, as to bring the case within some of the rules, whereby promises, which are confessedly in form to answer for the debt of another, are taken out of the statute, because they are not within its spirit, it is manifest, upon a mere statement of the case, that the only theory upon which a verbal promise of that character can be upheld, is that the old contract was disconnected from the new. Occasionally it may happen, that the facts show, that the parties to the new contract merely stipulated for the performance of the same acts, for which the old contract provided, without reference to the question

a levy extinguishes the judgment; and it has been held, that if after a levy the execution be returned unsatisfied by direction of the plaintiff, a purchaser of real estate, under a new execution, will get no title, unless, perhaps, where he had no notice. *Jackson v. Bowen*, 7 Cowen, 13. Also, that after a sufficient levy upon personal property, the judgment ceases to be a lien on real estate; and while the personal property remains unsold, the judgment creditor has no right to redeem real estate, from a sale under a previous execution. *Ex parte Lawrence*, 4 Cowen, 417. However where a levy has been made, and subsequently abandoned at the request of the defendant in the execution, there is no satisfaction of the judgment, and a new execution may issue. *Ostrander v. Walter*, 2 Hill, 329. Here is the distinction, if any exists, between a promise founded upon a discharge from arrest, and one founded upon the release of a levy.

whether that was to be fulfilled or not. In such cases, the statute has no application ; for then it is immaterial whether the old contract remained in force or otherwise. But in general it is entirely clear, that the parties could not have contemplated the performance of both the contracts ; and whenever this occurs, the two can be disconnected only by the abandonment of the first ; and the question whether it was or was not abandoned, becomes the turning point, upon which the application of the statute depends.

§ 295. In the next chapter, we shall refer with some particularity to the civil law doctrine of novation, of which this species of substitution forms a part. It is, according to the rules which prevail in the civil law, one of the ways in which may be effected that kind of novation called "*expromissio*," being the intervention of a new debtor, in place of him who is already bound. Other instances of the same process will be given in the next chapter ; being cases where an antecedent liability of a third person was discharged, by mutual agreement between him, the creditor and the new promisor, in consideration of its assumption by the latter. The feature, wherein that process of extinction of the original liability, differs from the one now to be considered, is that in this class of cases, the person originally bound was not a consenting party to the transaction ; a fact which gives rise to some significant distinctions, not only with respect to the application of the fourth rule, but also with respect to the effect of these cases, upon an important question, hereafter to be discussed, arising in connection with the eighth rule.

§ 296. Although, as it would seem, the civil law permits a substitution of one debtor for another, to be made in some cases, without the concurrence or consent of the original debtor, (a) such is not, strictly speaking, the rule

(a) Pothier on Obligations, part 3, chapter 2, article 4, section 5 ; Evans's Translation, volume 1, page 562. The reason is said to be that "*Ignorantis enim et inviti conditio melior fieri potest.*"

of the common law, which requires two parties to discharge a contract, as well as to make it. At common law no act, to which both the original contractors have not become parties in some form, can be pleaded by either as a discharge of the obligation of the contract, in an action by the other to enforce it; even although it may have been the act of the plaintiff himself. But a party may disqualify himself from enforcing a contract, against the other party to it, by acts which will prevent him from making that proof of performance, or of readiness to perform on his part, which is essential to his right to maintain an action founded upon it. When such acts are accompanied by the promise of another person to respond, in consideration of the promisee rendering the same services, or furnishing the same property, which formed the subject-matter of the original contract, the latter's abandonment of the contract, and election to rely exclusively upon the new promise, may properly be inferred; and although he would be liable in damages to the other party, in consequence of his refusal to fulfil it, he would have no remedy for the services or property, except against the promisor. Hence, as far as this question is involved, the practical effect of such conduct ought always to be, and in general is the same, as if the contract had been rescinded by consent of both the parties to it.

§ 297. All the cases in this class agree, that the test of the application of the statute is, whether, upon the performance of the new contract by the promisee, he could recover against the original contractor. (b) Sometimes it is said to be, whether the promisee has made himself liable to the original contractor, for damages, in consequence of his non-fulfilment of the original contract; a proposition which is frequently the correlative of the

(b) See, in addition to the authorities hereafter cited, *Puckett v. Bates*, 4 Alabama, 390; *Ellison v. Jackson Water Company*, 12 California, 542; *Andre v. Bodman*, 13 Maryland, 241; *Newell v. Ingraham*, 15 Vermont, 422; *Larson v. Wyman*, 14 Wendell, 246.

other, but not always so ; because cases may occur, where performance was optional on the part of the promisee, or where the other party to the contract had made a previous default.

§ 298. When the language and the acts of the parties leave room for doubt, whether in fact the existing contract was abandoned ; or whether, on the other hand, the new contract was such as to leave the former one in force, and to add the credit of the new party to that of the original contractor, as security for its fulfilment ; questions often arise, which are very analogous to those presented upon the sale of goods, the loan of money, or the performance of services for the benefit of one person, upon a promise to respond by another, and are to be disposed of in the same way. Whether the language used imports, as matter of law, an original or collateral contract ; how far the province of the jury extends, when the language is of doubtful meaning ; the principles upon which to determine whether credit was given solely to the promisor ; the relevancy of certain facts as evidence upon that issue ; and various other similar questions, are substantially identical in both classes of cases. On this account, the two are frequently confounded ; cases belonging to this class being treated, as if they belonged to the other. But this is manifestly an error ; for the points, in which both are alike, are merely subordinate and incidental to the determination of the principal question, constituting the crucial test of the application of the statute ; and this is entirely different in the two classes. In one, it is whether the third person incurred any liability upon the original contract ; in the other, whether he was discharged from a liability which he had previously incurred. Another striking point of difference between them is, that it almost invariably happens, in this class of cases, that the promisor is the person to be benefited by the consideration of the promise, whereas the other depends upon the fact that the third person received the benefit of the consideration.

§ 299. But much of what was said under the third rule, upon these subordinate points, is closely applicable to the kindred questions arising under this rule; and the reader is therefore referred to the places, where the former have been fully discussed, upon principle and authority.^(c) A few cases belonging to this class, where some of those questions were presented, under circumstances calling for special notice, are appended.

§ 300. In *Warnick v. Grosholz*, 3 Grant's Cases (Pennsylvania), 234, A. D. 1858, the plaintiffs had commenced painting certain cottages, belonging to the defendant, under a contract between them and one Barber, a builder, who had a contract with the defendant, for building and finishing the cottages, and Barber was to pay the plaintiffs by doing certain work for them; he failed to do the work for the plaintiffs; and they thereupon stopped their work upon the cottages, saying to the defendant that "with Grosholz, the owner, they had no contract, and of course were not bound to go on;" to which the defendant made answer, "Go on with the work; that he had security for the building, and he would see it paid." The judge at the trial referred the words to the jury, "to say whether they imported a direct undertaking or a guaranty;" and the plaintiffs having had a verdict, the judgment thereon was affirmed on error, the court holding that the meaning of the words was properly referred to the jury.^(d)

§ 301. So also in *Payne v. Baldwin*, 14 Barbour (New York), 570, A. D. 1853. There the plaintiff had entered into a contract with one Stebbins, to furnish the marble and plaster to be used in the erection of certain houses, upon which Stebbins was doing the mason work under a contract with an insurance company; and a dispute having arisen between the plaintiff and Stebbins, respecting the amount due to the plaintiff for materials previously fur-

(c) See chapters sixth and seventh.

(d) See the case also cited, ante, §§ 181, 182.

nished by him, he refused to furnish any more of the materials; whereupon the defendant, who was president of the company, told the plaintiff's agent "to go on and furnish the stuff, and he would see it was paid for." The action was to recover for materials subsequently furnished, and a referee having reported in favor of the plaintiff, the report was set aside as against the weight of evidence; on the ground that Stebbins was liable for the materials, and the whole credit was not given to the defendant. This the court thought was apparent, from the following facts: "that the buildings were not the property of the defendant;" "that when the materials were delivered, the receipts were signed by Stebbins and that the accounts in the defendant's" (plaintiff's) "books were continued against Stebbins the same as before, and that no charge was made against the defendant, and it finally appeared that the insurance company paid" (doubtless Stebbins) "for the building of the houses."

§ 302. Again in *Noyes v. Humphreys*, 11 Grattan (Virginia), 636, decided A. D. 1854, the defendant's testator had leased his salt works to one Thompson, who had undertaken to make certain improvements thereon, to aid in which the defendant's testator was to advance to him certain sums; and the plaintiff had been employed by Thompson to do part of the work; but the plaintiff, after he had partly completed the work, "apprehending that Thompson would not pay him, stopped his work, and refused to proceed with it under his contract with Thompson;" whereupon the defendant's testator went to him and said, "The work is now commenced; it must go on. Go on and finish it; I will pay you for it," or "I will see you paid." The plaintiff then resumed his work and completed it; the defendant's testator attending to its execution, and giving directions. The plaintiff then rendered his account to Thompson; and after deducting certain payments made by the latter, during the progress of the work, he took Thompson's bond for the balance; and subsequently applied for the benefit of an insolvent act, returning the

debt in his schedule as owing by Thompson, and saying nothing about any demand against the defendant. At the trial the plaintiff had a verdict, various exceptions having been taken by the defendant, calculated to present the question whether the promise was within the statute of frauds. The judgment rendered upon the verdict was reversed in the Court of Appeals; partly because the court thought that even if the promise was valid, as to the work thereafter to be done, it would be within the statute; inasmuch as it was entire, and related also to work previously done. But the court also took the distinct ground, that as to the work thereafter to be done, the evidence tended to show that Thompson continued to be liable upon his contract with the plaintiff, notwithstanding the defendant's promise, and the completion of the work in consequence thereof; the instructions, given and refused at the trial, having failed to lay down clearly the rule of law, that in such a case the defendant's promise to pay for that work was within the statute.

§ 303. But the principle upon which the last case was decided, was perhaps pushed beyond its true limits, in the recent case of *Bresler v. Pendell*, 12 Michigan, 224, A. D. 1864. There one C. E. B. had made a contract with one St. Amour, for the erection by St. Amour of a block of buildings; and the latter had sub-let part of the work to the plaintiff. After such sub-letting the plan of the block was twice changed, in certain particulars tending to increase the expense of erection. The plaintiff commenced the work; but St. Amour twice failed to make the payments stipulated for by his agreement with the plaintiff; and on each occasion, as the report says, the plaintiff "abandoned said job, and refused to proceed further with the same; that on both of said occasions, the defendant requested said plaintiff not to abandon said job, and promised him that if he would continue the same to completion, he, the said defendant, would pay him, or would see him paid." Under this promise, the plaintiff on each occasion resumed his work, and finally

completed it; the defendant being frequently present, and giving directions, while the work was going on. These facts were found by a referee, who also found "that the said original contract between St. Amour and the plaintiff was still in existence and uncanceled;" that the extra work (the nature and value of which were detailed in his report), was not included in the contract between the plaintiff and St. Amour; that it was done at the request of the defendant; and that the defendant promised to pay therefor. It was held by the referee and the court below, that the defendant was not liable for so much of the work, as was included in the contract between the plaintiff and St. Amour; but that he was liable for the value of the extra work, and judgment was rendered for that only.

§ 304. The defendant brought a writ of error, and the judgment was reversed, the Supreme Court holding that there could be no discrimination between the work mentioned in the contract, and the extra work. Manning, J., said that if either was done on the defendant's promise, "it was not on his sole promise, but on his promise in connection with the previous promise of St. Amour;" for which reason, if the defendant's engagement was supported by any consideration, it should have been in writing; and that if the plaintiff abandoned the work, because St. Amour did not pay him, and afterwards resumed it on the defendant's promise, the evidence showed that he looked to St. Amour for his pay, and not to the defendant, except as a surety or a guarantor. The nature of this evidence is not stated in the report; but if it supported the referee's conclusions of fact, it is difficult to see upon what principle, a finding in favor of the plaintiff, for the whole amount of his demand, could have been properly set aside. With respect to the extra work, there is nothing to show (although a large portion of the finding is given verbatim) that St. Amour made any promise to pay for it. The decision was probably put upon the ground, that the referee's finding was against the weight of evidence.

§ 305. It seems to be settled that a jury, under proper instructions from the court, may find an abandonment of the original contract, from the mere declarations of the promisee to that effect, not communicated to the other party; although he has subsequently performed precisely the acts for which the original contract provided, and would be entitled to recover against the original contractor, but for the fact that they were not performed in fulfilment of the contract. This doctrine is strikingly illustrated by the decision of the Supreme Court of Vermont in *Sinclair v. Richardson*, 12 Vermont, 33, A. D. 1840. There it appeared that the plaintiff had entered into a written contract with one Upson; whereby he was to provide the materials and do the work, upon a house which was in the course of erection, on land of the defendant; that in 1831, he erected the frame of the house and partly inclosed it; that in the spring of 1832, when about to complete the work, the plaintiff said to the defendant, in substance, that he would do nothing more to the house, unless the defendant would agree to pay him; and the defendant answered, "Do you go on and finish the house, and I will pay you for it, or see you paid." Whereupon the plaintiff completed the work; but, the report says, the original contract between Upson and the plaintiff was still in force and unrescinded. At the trial the judge charged the jury, that the promise of the defendant was void by the statute of frauds; and a verdict and judgment having been rendered for the defendant, the cause came on to be heard upon exceptions to the ruling. The judgment was reversed, on the ground that it should have been left to the jury to say, whether the contract with Upson had been wholly abandoned by the plaintiff or not; and whether the defendant's undertaking was original or collateral.(e)

(e) This case came very near the dividing line; but, upon the whole, it appears that the jury might have inferred such an abandonment of the contract with Upson, as would prevent the plaintiff from recovering against him. In an action against him, he might have shown that although the work was done according to the contract, it was not done upon the contract,

§ 306. But this doctrine is subject to the qualification, that the original contract must have been of such a nature, that the promisee's claim to compensation thereunder could be abandoned by mere words, without also abandoning the performance of the acts for which it provided. Thus if an attorney has been employed to conduct an action or

but upon another contract with the defendant in this suit. As the book is scarce, and the opinion of Collamer, J., presents very clearly and correctly the principles which govern this class of cases, we insert it nearly at length. "When a contract is once made, it cannot be rescinded but by consent of both parties. But it does not follow that because a man has entered into a contract, and entered upon its performance, he may not utterly abandon and decline to perform it. If he does so, it still remains unrescinded and in force against him, and damages may be recovered for his non-performance, yet he can have no action thereon. He may, from the employer having become insolvent, refuse to proceed without a guaranty of his credit; but he can enforce no such guaranty unless it be in writing, as it is collateral. He may, from a consideration that the employer has become insolvent, or absconded, or otherwise become wholly irresponsible, entirely decline to proceed any further on the contract with him, preferring to lose what he has done, to completing the contract and losing all. If, in this case, a person make an entire, substantive, independent contract with him, to perform the same service, this may be enforced though not in writing, as it is not collateral. Whether the new contract be auxiliary or independent is a question of fact. If the terms used on the occasion clearly imply that the former contract is to continue, and the new one be auxiliary thereto; then it is matter of law that the new contract must be in writing. Such as the saying, 'Proceed, and if he does not pay you, I will.' But if the terms be uncertain, equivocal or ambiguous, then it must always be left to the jury to find, whether in fact the former contract was to continue; or whether the whole was abandoned, and the new contract and credit substituted in its place. In this case there was nothing in the terms used, which shows, as matter of law, whether the Upson contract was to continue or not. That was a question of fact for the jury to find. If from the language used, and the other facts which were or may be put into the case, the jury find that it was understood that the plaintiff was to proceed upon his contract with Upson, and the defendant was only to pay upon the failure of Upson, then the plaintiff cannot recover of the defendant without a writing. But if the jury find it was then understood, that the plaintiff wholly abandoned his contract with Upson, and was to proceed entirely on the employment of the defendant, then the plaintiff should recover of the defendant without any writing; and the same facts which would enable him to recover of the defendant, would prevent his recovery of Upson."

other legal proceeding, by a party thereto, and has entered upon the discharge of his duties; he cannot afterwards, without his client's participation, abandon the original retainer, and continue to appear and act as the attorney for the same party, upon a subsequent retainer from another person, and the latter's promise to compensate him. Such a promise would therefore be within the statute of frauds, although the attorney's services might have been subsequently rendered, and expenses incurred by him, entirely upon the credit of the new promisor. (f)

(2) *How far the question is material in this description of cases, whether the promisor received the benefit of the consideration for his promise.*

§ 307. We should not think it necessary to add to our general remarks in another place, respecting the weight to be given to circumstances connected with the consideration, (g) any thing specially applicable to this description of cases, but for the fact that there is an intimation, in a recent decision of highly respectable authority, that a distinction may be predicated upon the circumstance, that the consideration enured wholly to the benefit of the new promisor. It is quite important to guard against any misapprehension upon this point; not only to avoid confusion in similar cases, but also because the principles which govern the cases of this description, will shed considerable light upon a doctrine, depending entirely upon the nature of the consideration, which will be hereafter discussed at considerable length. (h)

§ 308. The decision referred to, (which is noticeable also on account of other questions involved,) was pronounced by the New York Supreme Court in *Devlin v. Woodgate*, 34 Barbour, 252, decided in the year 1861. There the plaintiff had been employed by one Cavenagh, a con-

(f) *Barber v. Fox*, 1 Starkie, 270; *Noel v. Hart*, 8 Carrington and Payne, 230.

(g) Chapter ii, article ii.

(h) Chapter xvii.

tractor with the defendant, to excavate a vault in front of the defendant's premises; and on the second day after he commenced his work, he went to the defendant, and said to him that he would not go on, unless the defendant would promise to pay him; whereupon the defendant told him "to go on, and finish the job, and he should be paid." After the work was completed, the plaintiff signed and made oath to an account therefor against Cavenagh, for the purpose of taking proceedings to make the defendant's property liable, under the mechanics' lien law. Upon a trial at the circuit, these facts were submitted to a jury under the judge's charge; and it was held on appeal, by a majority vote, that their verdict for the plaintiff was conclusive. The verdict included compensation for the one day's work, done before the defendant's promise; but as it did not appear what were the terms of the contract with Cavenagh, Sutherland, J., one of those composing the majority, suggested that it must be assumed that the plaintiff was not entitled to any compensation from him, till the work was completed; and if so, Cavenagh owed the plaintiff no debt, to which the promise could be collateral.

§ 309. But the same learned judge placed his decision on the main question, principally upon the ground that the work was for the benefit of the defendant, and was to be paid for by the defendant, either to Cavenagh or the plaintiff. Under the circumstances, he thought that after the promise, the plaintiff had a right to rely upon the defendant's retaining enough to pay him, out of the contract price payable to Cavenagh; and he expressed a decided opinion that an entire stranger, having no interest in the work, would not be liable under like circumstances. Welles, J., although he assigned as the principal reason for his opinion, that the plaintiff had violated his contract with Cavenagh, and that the circumstances upon which the defendant relied had been fairly submitted to the jury; also mentioned the fact that the defendant was benefited, as one of the elements which influenced his opinion in

support of the verdict, without pointing out in what manner it was significant.

§ 310. We must enter our entire dissent from so much of either opinion, as intimates that, as matter of law, the liability of the defendant would in any way be affected by the circumstance, that he was interested in the completion of the work. The remark was apparently obiter; for although the substance of the charge is not stated, no complaint was made of it; it must therefore have been in such a form, that the verdict was conclusive to show, that the contract between the plaintiff and Cavenagh had been abandoned, and that the work was done entirely on the defendant's credit. But as soon as the fact was ascertained that the original contract was abandoned, the remainder of the case was in all respects analogous to one arising under the third rule; and the chapters devoted to the discussion under that rule are crowded with decisions, to the effect that the defendant is liable if the consideration was furnished exclusively upon his credit, although it enured entirely to the benefit of another. And, as far as we have noticed, this case stands alone in its class, in attributing any particular legal significance, to the reception of the consideration by the defendant; although, as we have already remarked, that feature is almost invariably present in all cases of this description. On the contrary there are many, where that circumstance was disregarded; and some where the decision was the other way, although in that respect they are not distinguishable from *Deolin v. Woodgate*.⁽ⁱ⁾ It is impossible therefore to resist the conclusion, that the benefit received by the defendant, is material only upon the question of fact, whether the original contract was abandoned, and the subsequent work done entirely upon his promise.^(j)

(i) See particularly *Noyes v. Humphreys*, ante, § 302; *Ellison v. Jackson Water Company*, 12 California, 542; *Newell v. Ingraham*, 15 Vermont, 422.

(j) The defendant in *Payne v. Baldwin*, 14 Barbour, 570, ante, § 301, was a stranger; but that circumstance is adverted to only upon the question of fact.

§ 311. The weight to be given to the interest of the promisor, and other questions discussed in this chapter, were considered by the New York Court of Appeals, in the very recent case (March, 1868,) of *Brown v. Weber*, 38 New York, 187, reported in the court below in 24 Howard's Practice Reports, 306. There the defendant had entered into two written contracts with one Horton, providing that Horton would furnish the materials for, and build a saw mill for the defendant, on his (the defendant's) land, within a specified time; for which the defendant would pay Horton a certain sum, in a manner mentioned in the contract. After Horton had framed and raised the building, he and the plaintiff entered into two contracts, also in writing, whereby the plaintiff agreed with Horton to complete the building; for which Horton was to pay him a sum, smaller than the amount provided for in the defendant's contracts, by passing over to him the defendant's obligation for that amount. After the commencement of his work, the plaintiff became fearful that Horton was not responsible, and communicated his fears to the defendant; whereupon the latter, to induce him to go on with his work, promised him verbally "that if he would go on and finish the mill according to contract," he would see that he would not lose any thing by it, and that he got his pay.^(k) These facts were found by a referee, who also found that the defendant alluded to the contracts between himself and Horton; that the plaintiff finished the mill according to those contracts, with certain exceptions specified in the report; and that during the progress of the work, the defendant was often present, and expressed his approbation of the manner in which it was being done. The referee held that the defendant's promise was void by the statute of frauds; and the Supreme Court, by a

(k) There is nothing else stated in either report, to show an abandonment of the contracts between Horton and the plaintiff; and the report in 24th Howard further states, that the referee found that there was affirmative evidence, that the plaintiff regarded his contracts with Horton as being in full force.

majority vote, affirmed a judgment for the defendant, founded upon his report. From this decision the plaintiff appealed to the Court of Appeals, where the judgment of the Supreme Court was affirmed.

§ 312. Grover, J., who delivered the opinion in the Court of Appeals, first remarked, that as the promise of the defendant was conditional upon the fulfilment of Horton's contracts, and as those contracts had not been fulfilled, the plaintiff could not recover, leaving out of view the question arising under the statute of frauds; but as the referee and the court below did not proceed upon that ground, the case would be examined with reference to the statute. He then said, that the application of the statute of frauds is not necessarily affected by the fact, that the consideration was new; not arising out of the original obligation; and received by the promisor. In most cases, he said, these facts will show whether the party contracted an independent obligation in his own behalf, or whether his position was that of a surety; but not always, a remark which the learned judge illustrated by two supposed cases. Therefore, he said, "the receipt or non-receipt of the consideration by the party promising, does not determine, in every case, whether it is within the statute or not; but that the inquiry still remains, whether he entered into an independent obligation of his own, or whether his responsibility was contingent upon the act of another." In this case, therefore, the question is not determined by the fact, that the mill was built upon the defendant's land, and became his property, so that he received the consideration. The referee has determined, that the promise really was, that the defendant would become surety that Horton should pay the plaintiff for his work; and this determination accords with all the facts of the case. "It is true," the learned judge proceeded, "that it was competent for the defendant, although he had made the contract with Horton," . . . "to make an independent contract with the plaintiff for doing the same job, and to pay him therefor; and such contract would

not come within the statute; but the difficulty with the plaintiff's case is, that the referee has found no such contract; nor would the evidence warrant such a finding." (1)

§ 313. The fact that the promisor is to derive a benefit from the completion of the original contract, may, however, become important in connection with a question hereafter to be considered, namely, whether a promise to pay a pre-existing debt of another is within the statute, when the leading object of the promisor is to subserve some interest of his own. Some of the cases cited in the course of that discussion, are quite relevant to the principles now under examination; and the reader, who wishes to pursue the subject further, is referred to them in their proper places in that connection. (m)

(3) *Cases where the new promise was in terms an assumption of the liability of the original contractor.*

§ 314. This brings us to the last question to be considered here, namely, the effect of a promise, whereby the promisor in terms adopts the liability of the other party to the original contract. It is obvious that the fact that the parties adopted the terms of the original contract, will

(1) The court did not, in this case, refer directly to the effect of an abandonment of the original contracts; for it was conceded that the plaintiff's contracts with Horton were still subsisting; the argument of the plaintiff's counsel having been, that as the referee had found that the defendant's promise, related to the contracts between him and Horton, it could not be deemed collateral to the contracts between the plaintiff and Horton; to which the learned judge made answer, that the plaintiff's work was done upon the latter contracts; and the price to be paid by the defendant to the plaintiff, could not be determined by reference to the defendant's contracts with Horton. To which we may add, that it was a necessary consequence, from the finding that the plaintiff's contracts with Horton were not abandoned, that the defendant's promise was collateral to those contracts; for it was impossible to suppose that the plaintiff was doing his work upon two independent sets of contracts; under both of which he would be entitled to compensation.

(m) *Clay v. Walton*, 9 California, 328; *Kutzneyer v. Ennis*, 3 Dutcher (New Jersey), 371; *Emerson v. Slater*, 22 Howard (U. S.), 28, cited in chapter xvii.

not necessarily bring the promise within the statute, if the other circumstances show that it has been abandoned. For then it is evidently referred to, merely as a method by which the terms of the new engagement are to be ascertained. Of course the question whether such was in fact the intention of the parties, will depend upon the peculiar circumstances of each case, it being impossible to lay down any general rule on the subject.

§ 315. An instance of a contract of this kind, where the court held, but without assigning any reasons for its conclusion, that the statute did not apply to a promise to pay for work thereafter to be done, was presented in *Rand v. Mather*, 65 Massachusetts (11 Cushing), 1, decided in 1853. There the defendant, being the owner of certain lands, made a contract with one Whiston, providing, among other things, that Whiston should erect houses thereon; and Whiston made a contract with the plaintiffs, providing that the latter should do the necessary painting upon the houses, for which Whiston would pay them a specified price per yard, as the work progressed. After the plaintiffs had done part of their work, for which they were entitled to receive \$45, Whiston paid them \$15, and omitted to pay them the remainder; whereupon they declined to proceed further, and discontinued work for six weeks. The defendant, in order to induce them to proceed with it, then made to them one or more promises, respecting the language of which the witnesses differed somewhat; but all the different versions amounted substantially to promises to pay them, or to see them paid, what they were to receive under their contract with Whiston. The plaintiffs thereupon completed the work; and afterwards they made out and presented to Whiston a bill therefor; but the evidence left it uncertain, whether the bill had not previously been presented to the defendant. And the judge at the trial having instructed the jury to find a verdict for the defendants, upon their objection that the promise was within the statute, an exception to the ruling was sustained, and a new trial granted. Metcalf, J.:

delivering the opinion of the court, said that the only ground upon which the instruction could have proceeded, was that an agreement which is void in part by the statute of frauds, is void in toto. And, referring to a previous decision of the same court to that effect, (n) he discussed the question at length, overruling the previous decision, and holding that the ruling at the trial was erroneous, because the sound part could be separated from the unsound.

§ 316. But the principles upon which the question depends were elaborately discussed and illustrated in *King v. Despard*, 5 Wendell, 277, decided in 1830, by the New York Supreme Court. There the plaintiffs had contracted with one Tilman to find the materials and erect a tan-house for Tilman, at a stipulated price, payable when the building should be finished; and pursuant to the contract they "got out the timber and framed it; but before the building was raised, or the sills laid, Tilman absconded and they stopt the work." Before absconding, Tilman transferred the contract to the defendant, guaranteed its performance by the plaintiffs, and promised to indemnify the defendant against the plaintiffs' claims for erecting the building. The plaintiffs, after Tilman's departure, said to the defendant that they had determined not to go on with the work; and to abide the consequences of not performing their contract. The defendant told them to go on and finish the building, "and he would pay them or they should have their pay;" whereupon the plaintiffs completed the building. The defendant was present and gave directions, while the work was in progress; and at his request, the building was erected upon a different part of the land from that marked out by Tilman, and some alterations were made in the plan. Both parties however insisted upon their rights under the contract with Tilman; and the alterations were charged for separately as extra work; and the plaintiffs had recovered

(n) *Loomis v. Newhall*, cited ante, § 174, and note.

a judgment against the defendant for the extra work. The defendant from time to time made payments upon account of the work ; for which the plaintiffs, at the request of the defendant, drew orders in the defendant's favor upon Tilman, the defendant saying that he wanted them as vouchers in his settlement with Tilman ; and in fact they were applied upon a note, which Tilman held against the defendant. The plaintiffs sued for the balance due to them, and on the trial the judge ruled that the defendant's promise was within the statute. The defendant had a verdict accordingly, which the plaintiffs moved to set aside.

§ 317. The court granted the motion, Savage, C. J., remarking : "The defendant substantially undertook that the plaintiffs should have their pay according to their contract with Tilman. The consideration for this promise is the building of the house. The plaintiffs were bound by their contract to build it, and Tilman to pay them ; but when he became unable to pay, they preferred risking the consequences of a breach of their contract. The defendant had purchased the interest of Tilman in the work ; it was important to him to have it completed ; and the promise was, not to pay Tilman's contract, but as I understand it, to pay for the building according to the terms of that contract : it was either that, or a promise to pay as much as the building was worth. It was understood by both parties to be an undertaking to pay according to the terms of Tilman's contract, as an extra price was charged and paid for variations made from that contract." "There is no one circumstance in the case," continued the learned Chief Justice, "when properly explained, which proves an intention on the part of the plaintiffs to look to Tilman for their pay. They had abandoned their contract with him ; and what passed between them and the defendant must be considered as a new contract. The plaintiffs say, we will not put up the building for Tilman ; the defendant says, I stand in Tilman's place ; I have purchased his interest in the work, and the building is to be erected for

my benefit; go on and finish it according to your agreement with Tilman, and I will pay as he agreed to pay." Referring to the drafts upon Tilman, he added "that they favored the idea that the building was erected upon the responsibility of Tilman, and in pursuance of the contract with him; but this was removed by the plaintiffs' explanation."

§ 318. This case was followed by the present Supreme Court of New York, under circumstances involving considerable nicety in the application of the principle, in *Quintard v. De Wolf*, 34 Barbour, 97, decided A. D. 1861. There the plaintiff had been employed by one Gardiner, an inventor, to manufacture a machine, which Gardiner had agreed to furnish, for a specified sum, to one Steadman; and Gardiner was to pay the plaintiff by Steadman's accepted drafts upon D. S. & Co., a firm in New York; the contract between Gardiner and Steadman providing for the latter furnishing such acceptances, and D. S. & Co. having agreed with Steadman that they would accept his drafts for the amount. From the opinions delivered in the case, it is apparent that by the terms of the contract, drafts for the price of the machine were to be given to the plaintiffs, when the machine should be finished and delivered; and it would seem that the delivery was to be made by the plaintiff to Steadman, and that the price was fixed at the same sum, which Steadman was to pay Gardiner therefor.

§ 319. The plaintiff had nearly finished the machine, when D. S. & Co. refused, or said they would refuse to accept Steadman's drafts; whereupon, according to the plaintiff's version of the matter, he refused to go on with the work, unless Gardiner "would give a responsible party in New York." Steadman then applied to the defendant, to accept his drafts for the price of the machine, when it should be completed, which the defendant verbally agreed with him to do; and Gardiner having so informed the plaintiff, the latter saw the defendant, who

told the plaintiff to go on and complete the machine "and he would pay him in his notes of four and six months, or in Steadman's drafts accepted by him, as he, the plaintiff, might prefer." When the machine was completed, Steadman refused to take it or give his drafts therefor; whereupon this action was brought. There was conflicting testimony as to what took place, after the refusal of D. S. & Co. to accept the drafts of Steadman; and at the trial the judge charged the jury, (*inter alia*,) that if after such refusal, and the plaintiff's refusal to go on with the work, the defendant promised to pay for the machine if he would complete it, the defendant was liable for the price; and the defendant's request to charge the jury that the original contract was not terminated, and that Gardiner continued from first to last to be liable was refused.

§ 320. The jury found a verdict for the plaintiff, and the judgment rendered thereon was affirmed on appeal. The court remarked that Steadman, who was to receive the machine, did not appear personally in the transaction at all; and although it might have been a question whether Gardiner or D. S. & Co. were the persons originally and directly responsible, that was not material, if the original contractor, whoever he was, was discharged and the contract terminated, which was properly left to the jury; and that the defendant's request was correctly refused, because it asked a positive instruction upon a disputed question of fact; the request should have been, that if Gardiner was from first to last liable to the plaintiff, the defendant was not liable. The material fact in the case was that the first contract was rescinded and terminated, and therefore the agreement upon which the action was brought was original. (*o*)

(*o*) The facts of this case have been partly extracted from the opinions; in one of which, given on a previous appeal, it is said that D. S. & Co.'s agreement was with the plaintiff, and that it was not within the statute, they alone being liable for the price.

CHAPTER TENTH.

THE SAME SUBJECT CONTINUED — CASES WHERE THE EXTINGUISHMENT OF THE THIRD PERSON'S LIABILITY WAS EFFECTED BY AN AGREEMENT, TO WHICH HE, THE PROMISOR, AND THE PROMISEE WERE PARTIES.

ARTICLE I.

The doctrine of novation.

§ 321. The process by which one person becomes substituted as another's debtor, in place of a third, who is discharged, is called a novation; a term which is borrowed from the civil law, together with the rules by which the doctrine known by that name is governed. The introduction of the doctrine of novation into the common law has been gradual, and our courts have not yet fully adopted all its incidents, as they prevail in the system of jurisprudence from which it was taken. An instance of this has already been given, (a) although there the same result is practically accomplished, in a way more consistent with the principles of the common law. In another important aspect of the doctrine, which is yet to be examined, there is great inconsistency, not to say conflict in the cases. We shall have occasion, in investigating the different phases of the application of the statute of frauds to promises to answer for the debt, etc., of another, to examine somewhat fully, how far the doctrine of novation has become engrafted upon the common law; and we therefore append here its definition, together with a statement of its elementary principles, and the general rules of its application, as we find them laid down by one of the most eminent of the continental jurists.

(a) See section 296.

§ 322. "A novation is a substitution of a new debt for an old. The old debt is extinguished by the new one contracted in its stead, for which reason a novation is included amongst the different modes, in which obligations are extinguished. A novation may be made in three different ways, which form three different kinds of novations. The first takes place without the intervention of any new person, where a debtor contracts a new engagement with his creditor, in consideration of being liberated from the former. This kind has no appropriate name, and is called a novation generally. The second is that which takes place by the intervention of a new debtor, where another person becomes a debtor in my stead, and is accepted by the creditor, who thereupon discharges me from it. The person thus rendering himself debtor for another, who is in consequence discharged, is called *expromissor*; and this kind of novation is called *expromissio*. The expromissor differs entirely from a surety, who is sometimes called in law, *adpromissor*. For a person by becoming a surety does not discharge, but accede to, the obligation of his principal, and becomes jointly indebted with him. The third kind of novation takes place by the intervention of a new creditor, where a debtor, for the purpose of being discharged from his original creditor, by the order of that creditor, contracts some obligation in favor of a new creditor." (b)

§ 323. As our proposed examination of the extent to which the doctrine of novation now prevails at common law, is merely subordinate to its effect upon the application of the statute of frauds to verbal promises, the first species of novation, which does not involve that question, will receive no special attention, and the examination of the third will be deferred to a subsequent chapter; (c)

(b) Pothier on Obligations, Part III, chapter 2, article 1; Evans's Translation, Vol. I, pp. 546 to 549.

(c) Chapter fourteenth, article fourth.

because, although its validity at common law rests upon the same grounds as that of the others, its validity under the statute depends upon a different principle. We will therefore proceed to the examination of the application of the statute, to cases where there has been a novation by the discharge of the person originally liable, and the acceptance of a new promisor in his stead, accomplished by mutual agreement between the three persons interested.

ARTICLE II.

Where, by consent of all the parties, the third person's antecedent liability to the promisee was discharged, in consideration of the promisor's engagement to pay to the promisee, a debt antecedently due by him to the third person.

§ 324. This species of novation was the first to be recognized by the common law, and it is sometimes said to raise an exception to the rule that a chose in action cannot be assigned; but, whether this expression is strictly accurate or not, it is well settled that an action in favor of a transferee of a debt against the debtor, must be founded upon a promise of the defendant to the plaintiff to pay the debt to him. In the United States it seems to be held, that the debtor's liability is sufficient as a consideration for the promise; but in England it is said, no doubt correctly upon the strict rules of the common law, that like all other contracts, such a promise is binding upon the promisor, only when it was founded upon a distinct consideration, moving between the parties to the promise; at least to the extent that it must be something done, or permitted to be done by the promisee, at the express or implied request of the promisor. Where the consideration of the transfer was a debt due to the transferee by the transferor, forbearance upon, or the discharge of which formed the consideration of the promise, by the person who owes the debt transferred, the question is at once presented, whether the promise was to answer for the debt of another, within the statute of frauds; and this question has given rise to many doubts and considerable nicety of distinction. We shall examine hereafter that aspect of it which is presented, where the promise was founded upon forbearance, or any other con-

sideration, than the discharge of the debt due from the transferor to the transferee. Where it was founded upon such a discharge, and the promise was verbal, its validity, under the statute of frauds, is determined by the principle embodied in the fourth rule.

§ 325. The common law writers generally confine the generic term novation to the latter species of contract; but it is generally known in the civil law as a delegation, or double novation, concerning which the eminent author already quoted says: "Delegation is a kind of novation, by which the original debtor, in order to be liberated from his creditor, gives him a third person, who becomes obliged in his stead to the creditor, or to the person appointed by him." "A delegation includes a novation, by the extinction of the debt from the person delegating, and the obligation contracted in his stead by the person delegated. Commonly, indeed, there is a double novation; for the party delegated is commonly a debtor of the person delegating; and in order to be liberated from the obligation to him, contracts a new one with his creditor. In this case there is a novation both of the obligation of the person delegating, by his giving his creditor a new debtor, and of the person delegated, by the new obligation which he contracts." (a)

§ 326. The principle of this kind of novation, although no name was given to it, is to be found in some very early cases, but its first promulgation in the common law, is generally attributed to Buller, J., in *Tatlock v. Harris*, 3 Term Reports, 174, A. D. 1789; a case having no special relevancy to this question, but where that eminent judge, in answer to one of the counsel, during the argument, made the following observation: "Suppose A owes B 100*l.*, and B owes C 100*l.*; and the three meet, and it is agreed between them that A shall pay C the 100*l.*; B's

(a) Pothier on Obligations, Part III, chapter 3, article 6, sections 1 and 2. Evans's Translation, vol. I, pp. 564 and 565.

debt is extinguished, and C may recover that sum against A." There is no further allusion in the case to this subject; but this incidental remark of Mr. Justice Buller has been construed in subsequent cases, as laying down three rules or propositions, namely: 1. That wherever the transaction between the parties is such, that the two intermediate debts are extinguished, the promise is good at common law. 2. That the promise is not good, unless both the intermediate debts are extinguished. 3. That in the particular case put, both the intermediate debts were extinguished as matter of law, although there were no express words of discharge of either. The question whether the second of these propositions is law, will be examined at length in subsequent chapters. (b) The first is the only one with which we have any direct concern in this connection. We will illustrate it by a few cases, showing the circumstances under which the two intermediate debts are regarded as discharged, or vice versa; and as it is frequently dependent upon the third, some of the cases necessarily involve that proposition also. It makes no substantial difference, whether the question, respecting the validity of the promise, arises at common law or under the statute. Indeed the cases treat it, as arising in either aspect indiscriminately.

§ 327. In *Browning v. Stallard*, 5 Taunton, 450, decided A. D. 1814, in the Common Pleas, the plaintiffs sued as assignees in bankruptcy of one Morgan, to recover the value of a cask of gin; and it appeared that the cask was ordered from Morgan by, and delivered to one Phillips, a publican, who afterwards "gave it over" to the defendant, another publican; when the rider of Morgan came for his money, Phillips said to him that he had sent the cask to the defendant, who would pay him when he came around again; and the defendant then coming in, this was repeated, and he assented to it. At the trial, it was objected that the promise was within the statute, and it

(b) Chapter twelfth, and chapter fourteenth, article fourth.

was contended that as the gin was originally sold to Phillips, the mere taking possession of it by the defendant, would not give the plaintiffs a cause of action upon any other ground; but Chambre, J., before whom the cause was tried, thought this was a transfer of the sale by consent of all parties, and not an agreement to pay the debt of another, and the plaintiffs had a verdict. A motion was made to set aside the verdict and for a new trial, but the court refused a rule, holding that the ruling below that it was a transfer was right, and adding: "An action could, after that consent, no longer have been maintained against Phillips for the goods. It was a new sale of them to the defendant."

§ 328. The case of *Cuxon v. Chadley*, 3 Barnewall and Cresswell, 591,(c) A. D. 1824, in the King's Bench, presented directly, only the question whether the original debtor to the plaintiff was in fact discharged, the solution of which, however, depended upon whether the new promisor in fact assumed any legal liability. This was an action in favor of the assignees of one Sweet, a bankrupt, against James Chadley, to recover a sum due for goods sold to him by the bankrupt; and the defence was that before the bankruptcy, Robert Chadley, the defendant's brother, who then had an account current growing out of various transactions with Sweet, and at the same time owed the defendant a larger sum, than the bill of goods for which this action was brought, had requested Sweet to charge this amount of James's bill to his (Robert's) account current, to which Sweet had assented; and when the account was adjusted between Robert and Sweet at the end of the year, Sweet, by Robert's direction, entered to Robert's debit, that charge, which nearly balanced the account between them. Soon after making the arrangement with Sweet, Robert communicated it to his brother James, the defendant; but the report does not state that any thing ever passed between Sweet and the defendant.

(c) 8 C., 5 Dowling and Ryland, 417; and 1 Carrington and Payne, 174.

The plaintiffs had a verdict, and a rule nisi to enter a nonsuit was discharged ; on the ground that the entry was proof merely of an assent to debiting Robert with the goods, and not that the bankrupt consented to take Robert as his debtor, and discharge James. Abbott, C. J., remarked, that at most there was an accord between Robert and the bankrupt, but no satisfaction ; and he added, " We cannot say, therefore, that either Robert could have been made to pay this money to Sweet, if he had called for it, or that James is discharged from his original obligation to pay the amount of goods sold to him." (d)

§ 329. So in *Wharton v. Walker*, 4 Barnewell and Cresswell, 163, and 6 Dowling and Ryland, 288, decided in the same court, A. D. 1825. There one Lythgoe was indebted to the plaintiff, and gave him an order for the amount of the debt upon the defendant, who was his tenant, payable out of the rent that should next become due ; and the plaintiff sent the order to the defendant, without any further communication between them. When the next rent became due, the defendant produced the order to Lythgoe, and promised him to pay the amount to the plaintiff ; whereupon Lythgoe allowed him to deduct that amount, and on his paying the difference, gave him a receipt for the whole sum. The plaintiff then brought this action, declaring for money had and received, and upon an account stated. On the trial he was nonsuited, on the ground

(d) The trial of this cause is reported in 1 Carrington and Payne, 174, from which it would appear that the ruling turned upon the ground, that Robert's agreement to pay James's debt was within the statute of frauds. The notes of the argument are given at page 485 of the same volume ; where it is said, that on counsel for the plaintiffs insisting that Robert could not be bound without a writing, Bayley, J., answered : " There you are quite wrong, Mr. Marryatt ; for there are many cases which decide that a man, by word only, may take a debt upon himself, discharging the principal debtor. In this case Robert owes James money ; and by this arrangement, Robert is to pay Sweet what he would otherwise pay to his brother." To which Marryatt answered, that there was no evidence that Sweet knew that one brother owed the other any money.

that the promise was within the statute of frauds, and a rule nisi to enter a verdict in his favor was discharged. Although the court thought that the declaration should have been special; all the judges, delivering opinions seriatim, also agreed that the action could not be maintained; because, as the three parties did not concur in the arrangement, the debt due from Lythgoe to the plaintiff had not been discharged, and the plaintiff might collect it from him; so the case did not come within Buller's rule. (e)

§ 330. There are a few cases in the United States, where the correctness of the first or of the third proposition, derived from the rule in *Tatlock v. Harris*, has been denied, either expressly or by implication; (f) but they run decidedly counter to the general current of the American decisions. Indeed this seems to favor the much broader rule, that a promise by a debtor to pay his debt to a transferee thereof, is valid, at common law, without any new consideration; and under the statute of frauds, upon the principle embodied in the sixth rule. We will cite some specimen cases where the first and third propositions were recognized and their application illustrated; and where also the validity of the transaction, under the statute of frauds, was either expressly affirmed, or admitted by implication.

§ 331. In *Haydon v. Christopher*, 1 J. J. Marshall (Kentucky), 382, A. D. 1829, the plaintiff was a creditor of one

(e) This case, and several others not cited here, where it was ruled, upon grounds which appear to be unsatisfactory, that there was a discharge of the intermediate debts, are commented upon in the note at the conclusion of chapter xiv.

(f) *Smith v. Coleman*, 1 Bibb (Kentucky), 488, A. D. 1809; *Gunnels v. Stewart*, 3 Brevard (South Carolina), 52, A. D. 1812; *Jones v. Ballard*, 2 Mill (South Carolina), 113, A. D. 1818; *Smith v. Stevens*, 3 Indiana, 332, A. D. 1852. In the last mentioned case it is said that a transaction, which was substantially the same as the supposed case put in *Tatlock v. Harris*, would be void under the statute of frauds; but the decision was put upon another ground, which calls for no comment here, as it did not arise under the statute.

Cock to the amount of \$25, and the defendant said that he owed Cock \$20; and thereupon an agreement was made between the three, whereby the defendant agreed to pay the plaintiff \$20, and the two intermediate debts were discharged. Afterwards Cock fled from the State; and the defendant then said that he did not owe him as much as he had supposed, and refused to pay the plaintiff. It was objected at the trial, that the promise was within the statute, and the defendant had a verdict under the instructions of the court. The judgment rendered thereon was reversed, and a new trial ordered; the Court of Appeals holding that the promise was not within the statute, and that after procuring Cock's release by the plaintiff, the defendant could not show that he had been mistaken in the amount of his debt to Cock.(g)

§ 332. An American case, where a novation was sustained under the rule of *Tatlock v. Harris*, in an action by the substituted creditor seeking to recover upon the original liability, is reported under the name of *Heaton v. Angier*, 7 New Hampshire, 397, decided A. D. 1835. There the plaintiff sued for the price of a wagon sold to the defendant, and it appeared that immediately after the sale, one Chase bought the wagon from the defendant, at a slight advance upon the price; that Chase and the defendant went to the plaintiff; and Chase agreed to pay to the plaintiff the purchase price of the wagon, to be paid by the defendant; "and the plaintiff agreed to take Chase as paymaster for that sum, and thereupon Chase took the wagon and went away." Upon a verdict, subject to the opinion of the court, it was held that the action could not be maintained; as the agreement of the plaintiff to take Chase as his debtor discharged the defendant, the debt due from Chase to the defendant being simultaneously discharged.

(g) The last paragraph is in accordance with part of the ruling in *Beach v. Hungerford*, post § 336.

§ 333. And in *Wood v. Corcoran*, 83 Massachusetts (1 Allen), 405, A. D. 1861, a verbal agreement between the plaintiff, the defendant, and a third person, who was the plaintiff's debtor and the defendant's creditor, that the defendant would pay the plaintiff the debt against the third person, and that the latter should be discharged, was sustained as not being within the statute. And the court said, that the agreement operated to discharge as much of the defendant's debt to the third person, as was equal to the sum which he undertook to pay to the plaintiff.

§ 334. In *Grover v. Sims*, 5 Blackford (Indiana), 498, A. D. 1841, it was held that a novation was good which took effect immediately, although the amount of the substituted debt was not definitely known, and payment was to be postponed till the amount should be ascertained. There the defendants were indebted to one Treadway, "having funds or cash of his in their hands," and Treadway was indebted to the plaintiff upon a promissory note made by him; the parties met, and mutually agreed that the defendants should pay to the plaintiffs the amount they owed Treadway, "so soon as the precise amount of their indebtedness to Treadway, could be ascertained by reference to their accounts." Upon the trial, various objections were taken to the recovery, among them that the plaintiff had not proved that he had delivered up Treadway's note, or otherwise expressly released him, but the judge charged that this was not necessary, and the plaintiff had a verdict, which was affirmed upon appeal. The opinion of the court, reviewing the English cases, held that the debt from Treadway to the plaintiff was extinguished, and that the action for money had and received lay against the defendants.

§ 335. An instance of double, or as the civil lawyers would perhaps call it, quadruple novation, or double delegation, occurred in the case of *Beach v. Hungerford*, 19 Barbour (New York), 258, A. D. 1855. There the

double discharge, will sustain a promise by a debtor to pay his debt to a transferee thereof, is of course entirely distinct, at common law, and under the statute.

ARTICLE III.

Where the third person's antecedent liability to the promisee was discharged, in consideration of its assumption by the promisor.

§ 338. This class of cases, like that which formed the subject of the third article of the last chapter, comes within the second species of single novation described by Pothier, and called *expromissio*, (a) being that which takes place "by the intervention of a new debtor, where another person becomes a debtor in my stead, and is accepted by the creditor, who thereupon discharges me." It is valid, at common law and under the statute of frauds, only when it is made by the concurrence of the three parties; that is to say, the creditor, the old debtor, who is to be discharged, and the person who is to assume his place. As it constitutes only one half of that species of delegation, to the examination of which the preceding article is devoted, one of the elements of the consideration, necessary to the validity of a contract of that kind, is unimportant in this species of contract. Here the consideration for the assumption of the new liability by the new debtor, is merely the discharge by the creditor of the original debtor; and it is of no consequence what was the consideration, or whether any consideration passed, between the new debtor and the person discharged; whereas, as we have seen, it is one of the ingredients of a delegation by double novation, that the former shall be discharged by the latter of a precedent debt owing by him.

§ 339. In this class of cases, as in the other, any thing which amounts to a valid discharge of the original debtor, suffices to take the promise out of the operation of the statute; respecting which, it may, in general terms, be said

(a) See ante, § 322.

that any words or acts passing between him and his creditor, indicating unequivocally an intention on the part of the latter, immediately and thenceforth to abandon his demand, and an assent thereto on the part of the former, will suffice.

(1) *Cases illustrating the general principle, and the rule that the three persons in interest must concur.*

§ 340. The question whether the discharge of the principal debtor, by a tripartite agreement, sufficed to take a stranger's promise out of the statute, arose and was affirmatively decided in *Bird v. Gammon*, 3 Bingham's New Cases, 883, in the Court of Common Pleas, A. D. 1837. (b) There the plaintiff had issued a fieri facias upon a judgment in his favor against one Lloyd. Subsequently Lloyd conveyed to the defendant his farm and farming stock; the defendant verbally undertaking in return, as was expressly proved at the trial, and as it also appeared by the recitals of the deed, to satisfy Lloyd's creditors; and it was a part of the agreement, the plaintiff being a party to it and an attesting witness to the deed, that Lloyd should be discharged. The plaintiff then withdrew his execution, and Lloyd continued to manage the property as the defendant's bailiff. About three years afterwards, the defendant, having examined the plaintiff's account, acknowledged its correctness. At the trial two objections were made to a recovery, one of which is not important in this connection; the other was that the defendant's engagement was within the statute of frauds. The plaintiff had a verdict; and upon the argument of a rule nisi, the court held that the promise was not within the statute, because Lloyd could set up the agreement, in bar of a new suit, or to stay proceedings upon the judgment; so that the plaintiff had effectually discharged him, and accepted the defendant's undertaking, in lieu of any remedy against him. The rule was therefore discharged.

(b) S. C., 5 Scott, 213, and 3 Hodges, 224.

§ 341. On the other hand it was held by the same court in *French v. French*, 2 Manning and Granger, 644, (c) A. D. 1841, that as it did not clearly appear that the original debt was discharged, the defendant's promise to pay it was within the statute. There the plaintiff sued to recover, among other items of an account, the amount of 321*l.* 5*s.*, being a debt originally contracted by the defendant's father; and it appeared that the defendant, who was a naval officer, had given to the plaintiff a writing, (insufficient under the statute of frauds,) acknowledging that he had received from the plaintiff 321*l.* 5*s.*; and desiring that in case of his death, during his absence from England, or at any time before the debt was liquidated, the plaintiff should be paid out of any property the defendant might possess. It was further shown that this writing had been given to avoid proceedings against the estate of the father, who had died abroad in embarrassed circumstances. It also appeared that the defendant's sisters had subsequently entered into some written engagement, (which had been destroyed by a fire,) to pay the same debt. At the trial the defendant had a verdict; and upon a motion to enter a verdict for the plaintiff, the latter's counsel contended that the writing was evidence of a loan by the plaintiff to the defendant, to enable him to discharge his father's debt; in which object, as one of the next of kin, he was personally interested. But Tindal, C. J., said that "the substratum of that suggestion must be that the debt due from Dr. French" (the father) "was satisfied. But it is inconsistent with such a supposition, that the plaintiff should afterwards obtain from Dr. French's two daughters, a note or engagement to pay the same debt." The rule was accordingly discharged, on the ground that the promise was void for want of consideration, and also as being within the statute.

§ 342. In the English chancery case of *Emmet v. Dewhurst*, 15 Jurist, 1115, 3 Macnaghten and Gordon, 587,

(c) S. C., 3 Scott's New Reports, 121.

and 21 Law Journal, N. S., Chancery, 497, decided in the year 1851, it was held that a promise was within the statute, whereby the promisor undertook to substitute for a liability resting upon another, the joint liability of himself and the original debtor. Such a substitution, as will presently appear, (d) suffices to satisfy the principle now under examination, because the original several liability is thereby extinguished. The reason, why this particular case was taken out of this class of cases not within the operation of the statute, is not given in the opinion; and it may be that the Lord Chancellor overlooked or dissented from the doctrine, that a joint promise extinguishes the original debt; but probably he put his decision on the ground, that the plaintiff did not discharge the original liability, but only promised to do so. The plaintiff, as public officer of the Halifax Joint Stock Banking Company, filed a bill to get the benefit of an indenture; whereby, in substance, the defendant agreed with one Turney, in behalf of himself and all the other creditors of Isaac Dewhurst, the defendant's brother, that in consideration of the abandonment of a fiat in bankruptcy against Isaac, and the acceptance forthwith by the creditors of a composition; he, the defendant, would guaranty a composition of eight shillings in the pound, to all the creditors of Isaac, whose debts exceeded 20*l.*, who would sign a good and effectual release of their claims against Isaac, before a certain day.

§ 343. In pursuance of the agreement, the joint notes of Isaac Dewhurst and of the defendant, for the proportionate part of each creditor's debt, payable at certain periods therein stated, and a release to be executed by the creditors, were seasonably prepared and placed in the hands of an agent, to deliver notes for his proportion to each creditor, who should execute the release by the appointed day. The banking company represented by the plaintiff, was one of the creditors, to the amount of nearly 2000*l.*,

(d) Post § 354, et seq.

part of which was for two dishonored bills drawn by Isaac upon one Carter, and accepted by him; and it declined to execute the release, or surrender the bills, until the result of certain legal proceedings then pending against Carter should be ascertained; for which purpose it desired an extension of time, urging as a ground for granting the extension, that the amount of the composition notes would be diminished, by a proportionate part of whatever could be collected from Carter. But the agent refused to deliver the composition notes, unless the bills were surrendered; and after some negotiations, he made, as was alleged by the plaintiff, a verbal agreement with the agent of the bank, to the effect that the bank should be considered a consenting party to the agreement for the composition, and to the release; but that it might postpone the actual execution of the release, and the delivery of the bills, until after the proceedings against Carter had terminated. These proceedings having extended beyond the time stated in the indenture, and having resulted in nothing; the bank insisted upon its right to have the benefit of the indenture, in consequence of the alleged verbal extension of time within which it was to release Isaac; and for that purpose this bill was filed.

§ 344. The Vice Chancellor (Knight Bruce) made a decree, referring it to a master to inquire into the authority of the defendant's agent to make such an agreement, and other matters preliminary to the granting of relief; and from that decree the defendant appealed to the Lord Chancellor, (Lord Truro), who dismissed the bill with costs. Assuming, he said, that the agent had the necessary authority, nevertheless the agreement was within the fourth section of the statute of frauds. "It is a special promise to answer for the debt of another person. It is not a promise, upon good consideration, to take the debt exclusively upon himself. It professes in terms to be a case of guaranty. The composition notes were to be the joint notes of Isaac Dewhurst, the principal debtor, and

of the defendant William Dewhurst, as his guaranty or surety. The agreement is clearly within the fourth section of the statute of frauds and must be in writing. Any alteration of the agreement must also be in writing." "Therefore whether what passed" (between the two agents) "is or is not to be contended to be a variation of the old agreement, or as the formation of a new agreement, it ought to be evidenced by some writing, and it is clear from the whole evidence that no such writing exists." (e)

§ 345. The modern American cases, with scarcely an exception, affirm the validity of verbal tripartite agreements of this character, at common law and under the statute of frauds. Thus in *Watson v. Jacobs*, 29 Vermont, 169, A. D. 1857, one Solomons had furnished a piece of cloth, and employed the plaintiff (a tailor) to make a coat for him; after it was made, the plaintiff handed it to him, and they went together, Solomons carrying the coat, to a place where Solomons said that he would get the money to pay the plaintiff. On arriving at the place, Solomons said that he had not enough money to pay for the coat, together with his fare to a place in New York, whither he was going; and, at his request, the defendant promised to pay the plaintiff's bill; whereupon the plaintiff "permitted Solomons to leave the State with the coat." These facts were found by an auditor, who also reported that the plaintiff had discharged Solomons. Upon this report the plaintiff had judgment, which was affirmed by the Supreme Court. Redfield, C. J., delivering the opinion said: "The general statement of facts indicates very clearly, that the plaintiff looked exclusively to the defendant. He did not fully surrender his control over the coat, until the defendant consented to assume the debt. He then permitted the first contractor to depart out of the country, and the auditor says he was thereby discharged from the debt. This, we think, can import nothing else but that the defendant was the sole debtor. If this case

(e) See this case further commented upon in the note to § 284, ante.

stood against Solomons, it would be impossible to give judgment against him.”(*f*)

§ 346. The principle was also very correctly laid down and applied in *Corbett v. Cochran*, 3 Hill (South Carolina), 41, and Riley’s Law Cases, 44, decided in 1836. There the plaintiff had an account against one Mrs. Pellott, and had sent the account to her for payment; soon after the defendant called upon the plaintiff with the account, and “promised to discharge the demand, by having the amount charged to himself;” and the plaintiff accordingly credited Mrs. Pellott with the amount in full, and charged it to the defendant, no time of forbearance having been agreed upon. The defence was that the promise was within the statute. At the trial the judge left it to the jury to say whether Mrs. Pellott was privy to the arrangement, and whether the credit, discharging her, was entered with the knowledge and by the direction of the defendant.(*f*) The jury found a verdict for the plaintiff. The defendant moved for a new trial and the motion was unanimously denied by the court. Earle, J., who delivered the opinion, after citing cases to show that if the original debtor was discharged, the defendant was liable, proceeded to consider the question, whether Mrs. Pellott was in fact and in law discharged. After saying that any promise may, before breach, be discharged by words only, and that although, as a general rule, a debt is not extinguished by the acceptance of a security of no higher nature, yet it will be thus extinguished if the parties expressly so agree; he added: “In these cases the validity of the new promise and the discharge of the original debt are mutually dependent; they arise at the same time, and result from the agreement of

(*f*) The case of *Croft v. Smallwood*, 1 Espinasse, 121 (see ante § 154), presented a strikingly similar state of facts; but the court put the decision upon an entirely different ground. This is but one of many illustrations, which might be adduced, of the extreme difficulty of classifying the cases under this branch of the statute of frauds.

(*f*) This appears from the opinion, although the “report” of the judge below, would indicate that he ruled expressly upon those points.

the parties, that the existing debt shall be extinguished and the first debtor discharged, in consideration of the new undertaking. There is no form of words or writing necessary to give effect to these mutual undertakings. If the promise to pay is binding, the agreement to discharge is equally so; each is binding because the other is." But in the case at bar, he continued, there was something more than a mere verbal agreement, as the plaintiff had entered a satisfaction upon his books, which constituted the evidence of his demand;(g) and he had thereby declared that he had no further claim against Mrs. Pellott, in whose stead he accepted the defendant as his debtor. In that respect the learned judge said, that the case at bar differed materially from *Cusxon v. Chadley*, 3 Barnewall and Cresswell, 591, where there was nothing except a debit to the new promisor.(h)

§ 347. So in *Walker v. Penniman*, 74 Massachusetts (8 Gray), 233, A. D. 1857, the defendant had an unfinished contract with one Hamblin, for certain piano-fortes, to be made by the latter; and Hamblin was indebted to the plaintiff upon a promissory note. A verbal agreement was made between the plaintiff and the defendant, "in the presence of Hamblin," to the effect that the plaintiff would finish up the work for the defendant, and be paid the same prices which he was paying Hamblin; "and the defendant agreed, that if the plaintiff would go on and finish up the instruments, the defendant would pay him the amount of the note; to which the plaintiff consented, and agreed to give up the note, and abandon all claim on Hamblin, and afterwards did give up the note." It was held that the promise was not within the statute, and a verdict for the plaintiff was sustained upon exceptions.

§ 348. On the other hand, *Stone v. Symmes*, 35 Massachusetts (18 Pickering), 467, A. D. 1836, was a case

(g) See ante, § 192, as to the effect of the plaintiff's books as evidence in South Carolina.

(h) See the case ante, § 328.

where the promise, although sufficient at common law, was void by the statute, because there was not a sufficient discharge of the original debtor. There one Woodward, being indebted to the plaintiff, had agreed to pay him in labor, whenever he should be called upon, at a specified price per day. Subsequently Woodward agreed to work for the defendant for a specified time, at a less price ; before the time had elapsed, the plaintiff called upon Woodward to fulfil his contract, and said to the defendant that he must have his bill paid for Woodward's work, and asked if he would give up Woodward ; to which the defendant answered that he would not give up Woodward, and that he would see the bill paid, or would pay the bill on demand. This took place in the presence of Woodward, who testified that the defendant, at that time, owed him something, and that something was due to him at the time of the trial ; but he could not tell how much ; and that he continued in the defendant's employment, in consequence of the latter's agreement to pay the plaintiff, and would not have remained, if the defendant had not so agreed. In an action upon this promise, the defendant objected that it was without consideration, and also void by the statute of frauds, but the court below, on a case stated, held that the plaintiff could recover.

§ 349. The judgment thereupon was reversed by the Supreme Court, and the plaintiff nonsuited. Putnam, J., delivering the opinion of the court, held that the benefit, which the defendant received from Woodward's remaining in his employment, constituted a sufficient consideration for the promise ; but that it was void within the statute of frauds, because the plaintiff's demand against Woodward was not discharged. He said : "It would, perhaps, have been sufficient, if the plaintiff had then expressly discharged Woodward in consideration of the defendant's promise, so relying upon it as an original undertaking, and upon the loss of his claim against Woodward, as the consideration for the promise of the defendant ; but there is no evidence of such an express discharge, and no facts

are stated, from which even an implied discharge of Woodward is to be necessarily inferred. Woodward's liability to the plaintiff continued. At most, the plaintiff agreed to suspend his claim for such time as he pleased, but not to abandon or discharge it at all events." The opinion makes no reference to the fact that the defendant was indebted to Woodward at the time; which circumstance apparently presented a question of delegation rather than of simple novation; but as the plaintiff's demand was small, it is probable that the intention of the parties was that the defendant should pay it, without deducting it from Woodward's wages.

§ 350. So in *Richardson v. Williams*, 49 Maine, 558, decided in 1861, the promise was void, both at common law and under the statute, because the original debtor was not discharged, there having been no sufficient concurrent action of the three parties in interest, to create a novation. There a certain railroad company was indebted to the plaintiff; and the defendant (who was, it is to be gathered from the case, an officer of the company) verbally agreed to pay the debt to the plaintiff, and in fact afterwards paid the amount into the hands of one Means, for the plaintiff, and charged it to the company. Means failed; and the plaintiff thereupon brought this action. There was no evidence, that the company had any knowledge of the verbal agreement between the plaintiff and the defendant; or that the plaintiff had ever discharged the company; but it was nevertheless ruled at the trial, that, as the defendant had charged to the company the amount, and had promised to pay it, he must be considered as having the money in his hands to the use of the plaintiff; and therefore that he was liable on the count for money had and received, unless he was authorized to pay it to Means as the plaintiff's agent. The jury found a verdict for the plaintiff. Upon an exception to the decision of the judge at the trial; a new trial was granted, the Supreme Court holding that the promise was without consideration, and also within the statute of frauds; because the plaintiff

relinquished nothing and the defendant obtained nothing, as he could not make the company his debtor, by paying or agreeing to pay its debts, without its request or consent.

§ 351. A similar principle controlled the decision in the more recent case of *Ellison v. Wischart*, 29 Indiana, 32, A. D. 1867. There the action was brought to recover a sum due to the plaintiffs for goods sold to the defendant's mother; and there was much conflict of testimony in the court below; the plaintiffs recovered judgment, from which the defendant appealed to the Supreme Court, where the judgment was reversed. The strongest testimony against the defendant, was that of one of the plaintiffs, who testified in substance that some time after the goods were bought, he had a conversation with the defendant, and informed him that the plaintiffs intended to sue his mother immediately for the price. The defendant requested him not to do so, saying, "I have means in my hands, and it may have a tendency to make the old lady worse." The plaintiff then said, "If you will assume this debt of \$104.77, and let me charge it to you, I will let the old lady alone, and wait with you till Christmas for the money." The defendant replied, "You may charge it to me and I will pay." The account was thereupon charged to the defendant. Gregory, J., delivering the opinion of the court on the appeal, said that it was clear that the defendant's promise was collateral unless his mother was discharged. "She was not present; and in no wise participated in the arrangement. She had no knowledge of it. It does not appear that she was discharged, or the account against her credited." "The defendant could not make Susannah his debtor by a voluntary assumption of her debt to the plaintiffs. How could she, in a suit by the plaintiffs against her for this account, set it up as a defence to her liability to them? The plaintiffs did not release her in terms. If she was released it was the result of the arrangement, not of any agreement on the part of the plaintiffs." "The plaintiffs might, at any time before the assent of Susannah was

given to the arrangement, have disregarded this voluntary assumption by the defendant, and have sued on the original promise. This suit can only be maintained on the ground of a substitution of one debtor for another."

§ 352. The foregoing cases are cited as specimens of the nice distinctions which obtain, in the application of this rule. Other American cases, of the same general character, are collected in the note.⁽ⁱ⁾ In each of them it was held that the immediate discharge of the original debtor, was the test by which to determine the validity of the defendant's promise to pay the debt.

§ 353. It is not necessary, however, that the debt of the third person, which is discharged by the promisee, should be a clearly ascertained legal liability; provided it is a claim, which might form the subject of an action. Thus in *Lord v. Davison*, 85 Massachusetts (3 Allen), 131, A. D. 1861, a married woman had invested money, which was her separate property, in a firm of which her husband

(i) *Jolley v. Walker*, 26 Alabama, 690, A. D. 1855; per Roane, J., *Wagoner v. Gray*, 2 Hening and Munford (Virginia), 603 (1808); *Draughan v. Bunting*, 9 Iredell (North Carolina), 10 (1848); *Curtis v. Brown*, 59 Massachusetts (5 Cushing), 488 (1850); *Wood v. Corcoran*, 83 id. (1 Allen), 405 (1861); *Brown v. Hazen*, 11 Michigan, 219 (1863); *Armstrong v. Flora*, 3 T. B. Monroe (Kentucky), 43 (1825); *Click v. McAfee*, 7 Porter (Alabama), 62, per Collier, J. (1838); *Antonio v. Clissey*, 3 Richardson (South Carolina), 201 (1832); *Bason v. Hughart*, 2 Texas, 476 (1847); *Anderson v. Davis*, 9 Vermont, 136 (1837); *Gleason v. Briggs*, 28 id., 135 (1855); *Cole v. Shurtleff*, 41 id., 311 (1868); per Gibson, J., *Allshouse v. Ramsay*, 6 Wharton (Pennsylvania), 331 (1841); *Cotterill v. Stevens*, 10 Wisconsin, 422 (1860). In *Watson v. Randall*, 20 Wendell (N. Y.), 201, A. D. 1838, the same principle was applied to a promise of the defendant to pay his mother's debt, in consideration of the plaintiff's promise not to sue her. The court assumed, (though doubting the correctness of the proposition,) that by the terms of the plaintiff's promise the forbearance was to be perpetual, no time therefor being specified; but it was held that the mother could not have availed herself of it, because she was not a party to the agreement, and for that reason the defendant's promise was within the statute. The effect, upon this class of cases, of the doctrine mentioned and the cases collected in chapter xii, article ii, has never been discussed, as far as our observation extends.

was a member with others, intending thereby to become a partner; but, (as had been held in a previous case,) the Massachusetts married women's act did not confer upon her the power to become a partner with her husband. The defendants bought the stock, etc., of the firm, and in addition to the purchase price paid by them to the firm, they verbally agreed with her to pay her a certain sum for her "share, interest, contribution, and investment" therein; in consideration of which she relinquished whatever rights she had against the firm. At the trial the judge ruled, that the legal effect of the transaction was to make her a creditor of the firm, and "that she was not the owner of any part of the stock, fixtures and materials;" but he declined to rule, as requested by the defendants' counsel, that she had no claim against the partnership, which she could enforce at law. The plaintiff had a verdict; and upon the hearing of the exceptions to the judge's rulings, it was held that there was no error in the rulings actually made, as applied to the facts proved; and that it was entirely immaterial whether the refusal to rule as requested was correct or otherwise; that although her rights were not very well defined, nevertheless their relinquishment constituted a sufficient consideration, for an express promise to pay her therefor; and that as her claim against the firm had been extinguished, in consideration of the promise of the defendants, the latter was a substituted and not a collateral undertaking, and therefore was not within the statute of frauds.(j)

(2) *Where the third person and the new promisor assumed a joint liability, in discharge of a previous liability of the third person only.*

§ 354. The principle now under examination will sustain, at common law and under the statute, a promise made by two persons jointly, and accepted by the creditor, to assume the payment of the individual debt of one of them; as in the familiar instance of a copartnership assuming the debt of one of its members. In such a case

(j) It is to be inferred in this case, although it is not very clearly stated, that the firm was a party to the agreement.

it is true, that in one sense the original debtor continues to be liable for the debt; but he is not liable in the same manner as before. The incidents and consequences of a liability jointly with others, and of a sole liability, are so different, that the conversion of the one into the other is very properly deemed an extinguishment of the old liability, and the substitution of a new one in its place.^(k) Such was the decision in *Ex parte Lane, in re London*, 16 Law Journal, N. S., Bankruptcy, 4, and 1 De Gex's Bankruptcy Reports, 300, decided in the year 1847. This was a petition for leave to prove a debt of 4000*l.* against the joint estate of two bankrupts (partners); and it appeared that before the formation of the partnership, one of the bankrupts was indebted to the petitioner, in the amount claimed; that at the time of the formation of the partnership, all parties had verbally agreed that the firm became liable to pay the debt, as the money had been embarked in the business; and that there had since been several conversations and transactions between the parties, on that footing. It was objected, on the part of the assignees, that the case was within the statute of frauds; but the Chief Judge (Vice-Chancellor Knight Bruce) said: "If A is a creditor of B, and B and C propose to enter, or have entered into partnership together, and address themselves to A, the creditor of B, and say, 'We wish that this debt, due hitherto from B alone, shall be a debt from B and C together,' and A accedes to the proposal, although no writing passes, that agreement is valid and effectual, and is not impeached or affected by the statute of frauds."

(k) Lord Denman, C. J., in his opinion in the case of *Thompson v. Percival*, 5 Barnewall and Adolphus, 925, and 3 Nevile and Manning, 167, thus speaks of the correlative proposition, that a joint liability may be discharged by the assumption in its place of a several liability, by one of the parties already jointly liable: "Many cases may be conceived, in which the sole liability of one of two debtors may be more beneficial than the joint liability of two, either in respect to the solvency of the parties, or the convenience of the remedy, as in cases of bankruptcy, or survivorship, or in various other ways; and whether it was actually more beneficial in each particular case, cannot be made the subject of inquiry." And see further on the same subject, *Lyth v. Ault*, 7 Exchequer, 669, and 21 Law Journal, N. S., Exch., 217.

The effect of it is, for a valuable consideration, to extinguish the first; and for a valuable consideration to substitute the second for it. Of course the very words I have referred to need not be used; and if there is sufficient evidence that the intention of the parties was so, that will be as effectual as if the most formal expressions had been used." His Honor then examined the evidence; which he said, satisfied him as a judge of fact, that such was the agreement of the parties in this case, and he therefore granted the application. (1)

§ 355. The same principle is well illustrated in the case of *Corbin v. McChesney*, 26 Illinois, 231, decided A. D. 1861, where there was in one sense a double novation. There the plaintiff in the court below, (McChesney,) had become indebted to the defendants, who were partners, in the sum of \$60, and the defendant Duffy was indebted individually to the plaintiff in the sum of \$119; by the latter's direction, in pursuance of a mutual agreement between McChesney and Duffy, the bookkeeper of the firm credited the plaintiff in the last named sum, and charged it to Duffy, upon the books of the firm. There was evidence that Corbin, the other defendant, afterwards assented to the arrangement; and it was objected that as to him, the promise was within the statute of frauds; but the court below held that as the debt against Duffy was extinguished, no writing was necessary in order to bind Corbin. The plaintiff having recovered judgment, the defendants brought a writ of error, and the judgment below was affirmed. It appears from some observations in the opinion of the court, although the reporter's statement of facts is silent on the subject, that the firm had been dissolved, and that Corbin had retained assets to pay this debt; but these facts seem to be mentioned more as evidence of his assent to the transaction, than as a distinct ground of his liability; for the court distinctly held that the verbal promise was sufficient, for the reason given in the court below; namely, that the individual debt due from Duffy

(1) See also *Butcher v. Stuart*, ante, §§ 281 to 284, and note.

was extinguished, and a new debt due the plaintiffs from the defendants created by the arrangement.

§ 356. The converse of the principle controlled the decision of *Sternburg v. Callanen*, 14 Iowa, 251, A. D. 1862. There the action was founded upon an alleged agreement, between the defendants and the plaintiff, made soon after the formation of a copartnership between the defendants; whereby the firm agreed to pay a debt due to the plaintiff from the defendant Stevens. There were various defences, among them that the alleged agreement was, as to the defendants Callanen and Ingham, without consideration and within the statute of frauds. There was some evidence of an assumption of the debt by one of the new partners, in behalf of the firm, but nothing to show that the other assented to it, or subsequently ratified it. The plaintiff had a verdict and judgment, which was reversed upon appeal. The court held that in order to sustain a promise of that character, either at common law or within the statute of frauds, "there must be a novation of the debt before the new firm is liable. In order to make it a new debt the old one must no longer exist." And the judge having ruled at the trial that the new firm was liable even if the debt was not discharged, it was held that an exception to the ruling was well taken, and the judgment was reversed for that reason, and also because the alleged promise was the unauthorized act of one partner only.(m)

§ 357. The correlative of the proposition which we have been discussing, namely, that the creditor of a partnership, by accepting the individual liability of one of the partners in lieu of the liability of the firm, discharges the other partner, seems to have been generally recognized, without reference to any question arising under the statute of frauds.(n)

(m) And see *Taylor v. Hillyer*, 3 Blackford (Indiana), 433, cited in chapter xiv, article iii, and other partnership cases there cited.

(n) Collyer on Partnership, §§ 557 to 562.

CHAPTER ELEVENTH.

CASES DEPENDING UPON THE WORDS "ANOTHER PERSON."

THE SUBJECT COMMENCED WITH THOSE ILLUSTRATING THE GENERAL PROPOSITION, THAT IN ORDER TO BRING THE PROMISE WITHIN THE STATUTE, IT MUST HAVE BEEN MADE TO THE CREDITOR.

§ 358. The last chapter completes the examination of that numerous class of cases depending upon the words, "debt, default, or miscarriages;" constituting the fourth class of the second general division. We are now to consider the fifth and last class; which was stated, in defining the terms of our classification, to consist of those, where there was nobody in the transaction, to whom the term "another person" could apply. (a) It was mentioned, at the same time, that upon principle, it would seem that this class might be extended further than the decisions carry it. Especially is this true with respect to the contract of a factor, in whose hands goods are placed by his principal for sale upon credit, with the stipulation that he shall respond for the payment of the purchase price, by the persons to whom he shall make sales; in other words, a factor who acts under a *del credere* commission. It appears to be well settled, in England and in the United States, that contracts of this kind are not within the statute of frauds, but the reasons assigned for this conclusion are not entirely satisfactory. These cases are made to depend upon considerations connected with the degree of diligence, which the agent assumes by his contract; whereas it is very clear that no diligence, however great, not even the continued solvency of the purchaser, will exempt the agent from liability to pay the debt, if the

(a) Section 70, and note.

purchaser has in fact failed to discharge it at maturity.(b) In that aspect, such undertakings are contracts of guaranty in the most undisguised form, and can only be taken out of the statute upon the ground, that although within its letter, they are not within its intent and meaning. But it is believed, that in truth they are not within its letter; because, at the time when the contract was made, no person was designated, for whose debt or default the factor undertook to answer. In other words, there was no one, to whom the term "another person" could by any possibility apply.

§ 359. For the same reason it would appear, that when the promise was to pay the debt owing by a person, who had deceased intestate, or without having appointed an executor, and no administrator had been appointed at the time of the promise, the case was not within the statute. Perhaps, also, the principle would extend to a case where the deceased had left a will, designating an executor, but the executor named therein had not accepted the trust, or qualified, if a special qualification is required by statute. The original debtor being dead, and no one having become liable for the debt, in a representative capacity, it would seem impossible, in such cases, to satisfy the words, "another person." But although this state of facts has occasionally been presented, and it has been held that the promise was not within the statute, the courts have failed to assign this as a reason for the decision; and hence we can only speculate, whether it would not have solved the difficulty, without resorting to some other theory which was of less obvious application.(c)

§ 360. Although the point has never been expressly decided, as far as we have noticed, it has been several times assumed that the statute includes a corporation, in

(b) See chapter eighteenth, article second.

(c) *Mease v. Wagner*, 1 *McCord* (South Carolina), 395; *Tomlinson v. Gill*, *Ambler*, 330; *Ledlow v. Becton*, 36 *Alabama*, 596; *Templetons v. Bascom*, 33 *Vermont*, 132.

the word "person;" (d) and such is doubtless its true signification, irrespective of any positive enactment that such shall be deemed the construction of that word, in any statute where it is used.

§ 361. Confining ourselves, therefore, to the construction given by actual adjudications to the expression "another person," we find the principle growing out of its use in this clause of the statute, to be that which is contained in the following rule:

RULE FIFTH.

A promise to discharge the debt or duty of another is not within the statute, unless it was made to the person to whom the debt or duty was to be discharged.

ARTICLE I.

Origin of the rule. How it is reconciled with the language of the clause under examination.

§ 362. Although this rule is regarded in England, as being the most recent of all those which are recognized there, as controlling the application of the statute, its traces are to be found in reported cases in the United States, from about the beginning of this century. Some of the most perplexing of the early English cases called for its application, but were decided upon other grounds; the suggestion that such was the true construction of the statute, not having occurred either to the counsel or the court. Lord Denman claimed it as original with him, in delivering his opinion, in a case which will presently be cited at length, *Eastwood v. Kenyon*, decided in the year 1840; and the English text books accordingly agree in attributing its origin to his lordship; but, to say nothing of the American cases, Bayley, J., in 1828, put his opinion in *Thomas v. Cook*, 8 Barnewall and Cresswell, 728,

(d) *Rogers v. Waters*, 2 Gill and Johnson (Maryland), 64; *Wyman v. Gray*, 7 Harris and Johnson (Maryland), 409; *Emerson v. Slater*, 22 Howard (U. S.), 28; *Richardson v. Williams*, 49 Maine, 558; *Trustees, etc., v. Flint*, 54 Massachusetts (13 Metcalf), 539; *Alger v. Scoville*, 67 Massachusetts (1 Gray), 391; *Jepherson v. Hunt*, 84 Massachusetts (2 Allen), 417; *Maule v. Bucknell*, 50 Pennsylvania, 39.

upon the ground, that the promise was not made to the creditor, for which reason, he thought that it was not within the statute; and the case of *Adams v. Dansey*, 6 Bingham, 506, decided in 1830, seems to have turned upon the same principle. It is to be regretted that the court failed to discover this rule of construction, in either of two earlier cases, which plainly called for its application, *Howes v. Martin*, 1 Espinasse, 162, A. D. 1794; and *Castling v. Aubert*, 2 East, 325, A. D. 1802. Had the last named case been decided, as it ought to have been, upon this principle, many perplexing questions, to which it has given rise, would have been avoided; and considerable error might have been kept out of the books, for the entrance of which it has at least helped to open the door.(a)

§ 363. The effect of this rule is precisely the same as if the statute read, that no action shall be maintained, upon a verbal special promise to answer for the debt, default, or miscarriages "OF A THIRD PERSON." And we have accordingly used the latter expression, throughout this work, as designating him, for whom the promisor undertook, or is supposed to have undertaken to answer, more accurately than that used by the statute itself.

§ 364. It would be difficult to suggest a form of words more comprehensive than "another person;" and at first sight, the meaning of the statute would seem to be, that a promise to answer for the debt, default, or miscarriages of any one, except the promisor himself, was within its terms. But the more limited construction given to this expression, is justifiable upon consideration of the evident intent of the framers of the act, who appear to have had in mind three persons; and as the word "another" calls for a correlative, the latter may, without violence to the grammatical construction, be found in the person whose

(a) All the cases referred to in this section, are cited at length in subsequent pages.

existence is implied, rather than in him who is expressly named; and thus the intention of the framers of the statute may be reconciled with its letter. In other words, this part of the statute may be construed, as if it read: "No action shall be brought" "whereby to charge the defendant upon any special promise *to one person*, to answer for the debt, default, or miscarriages of another person." But whatever may be the grounds upon which the rule can be defended, it is now well settled, both in England and in the United States; although it incidentally gives rise to some very perplexing questions, respecting which the decisions are irreconcilably at variance.

ARTICLE II.

Cases where the promise was not made to the creditor; where it did not relate to a liability thereafter to be incurred by the promisee; and where the promisee was the plaintiff in the action to enforce it.

§ 365. The case whence is derived the general recognition of this rule in England, is *Eastwood v. Kenyon*, 11 Adolphus and Ellis, 438, decided A. D. 1840.^(a) There the declaration stated in substance that the plaintiff, as the executor of the will of one John Sutcliffe, and as guardian and agent of Sarah Sutcliffe, his only daughter and heiress at law, had during her minority expended large sums of money, in maintaining and educating the said Sarah, and taking care of her property; that the estate was insufficient to allow the plaintiff to make such payments out of it, and he had advanced 140*l.* of his own moneys for the purpose; and to reimburse himself, he had borrowed the 140*l.* from one Blackburn, upon his promissory note; that after Sarah became of age, she had promised the plaintiff to pay the note, and had actually paid one year's interest thereon to Blackburn; and that the defendant had married the said Sarah, and afterwards he had promised to pay the plaintiff the said note to Blackburn; but had not done so. Upon the trial, it was objected that

(a) S. C., 3 Perry and Davison, 276, and 4 Jurist, 1081.

the promise was within the statute ; but the plaintiff had a verdict. A rule nisi was obtained to enter a verdict for the defendant, on the ground that the promise was within the statute, and also on a point of pleading ; and for arresting judgment on the ground that the declaration showed no consideration for the promise. After argument, judgment was arrested ; but the rule to enter the verdict for the defendant was discharged. Upon that point, Lord Denman, C. J., delivering the opinion of the court, said : "If the promise had been made to Blackburn, doubtless the statute would have applied ; it would then have been strictly a promise to answer for the debt of another ; and the argument on the part of the defendant is, that it is not less the debt of another, because the promise was made to that other, viz., the debtor, and not to the creditor ; the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration, we are of opinion, that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which the point has arisen ; or in which any attempt has been made to put that construction upon the statute, which is now sought to be established, and which, we think, not to be the true one."

§ 366. The rule established by this case, is frequently stated to be, that a promise made to the debtor is not within the statute. But it will be observed that the principle laid down by Lord Denman takes a wider range, and excludes from the operation of the statute, all promises not made to the person to whom another is answerable, or to some one directly representing him for the purpose of the promise ; not only in cases where the promisee is the debtor, but also where he occupies some other relation to the subject matter of the promise. And such has been the effect given to the decision in subsequent cases. Thus, in *Hargreaves v. Parsons*, 13 Meeson and Welsby, 561, A. D. 1844, (b) the defendant had sold to the

(b) S. C., 14 Law Journal, N. S., Exch., 250.

plaintiff a contract for the sale by one Parker, of the "put or call" of certain foreign railway shares, and had guaranteed the performance of the agreement by Parker. In the United States it is well settled, that such a promise would be excluded from the statute by the operation of the ninth rule, under which the case will be cited more at length.(c) But that rule seems to be unknown in England; and the court put its decision upon the principle established in *Eastwood v. Kenyon*, holding that the promise was not one to answer for a debt of, or a default in any duty by Parker towards the promisee; because he had made no contract with the plaintiff, and there was no privity between them.

§ 367. And the Court of Common Pleas has recently made a novel application of the doctrine, where the promisee was neither the debtor; nor one to whom the person, for whom the promisor undertook to answer, owed any debt or duty whatever; nor a representative of a person, to whom such a debt or duty was owing. In *Reader v. Kingham*, 13 Common Bench Reports, N. S., 344, decided A. D. 1862,(d) the plaintiff, who was bailiff of the Buckinghamshire County Court, had received a warrant for the commitment of one Hitchcock to jail, for non-payment of a judgment for 34*l.*, recovered against Hitchcock by one Malins; but by the county court act, such commitment is not a discharge of the debt, as in the ordinary case of a ca. sa., but merely a means of compelling payment.(e) Malins had authorized the plaintiff to accept 17*l.* in satisfaction of the judgment. The plaintiff, being about to arrest Hitchcock at the house of the defendant, his relative, the latter promised that if he would abstain from doing so, he, the defendant, would, on the following Saturday, either pay the plaintiff 17*l.* (which the plaintiff

(c) See chapter eighteenth.

(d) Same case, 9 Jurist, N. S., 797; 32 Law Journal, N. S., C. P., 108; 11 Weekly Reporter, 366; 7 Law Times, N. S., 789.

(e) Per Wilde, C. J., Ex parte Kinning, 4 Common Bench, 522.

then said to him that he was authorized to accept in full satisfaction), or else surrender Hitchcock; whereupon the plaintiff did abstain from arresting Hitchcock; but the defendant neither surrendered him nor paid the 17*l*.(f) The plaintiff brought this action on the promise; at the trial, a verdict was rendered for the defendant, under the instruction of the court; and the plaintiff obtained a rule nisi to set it aside, and enter a verdict in his favor.

§ 368. This rule was made absolute, all the judges delivering opinions. Erle, C. J., said: "The debt was due to Malins from Hitchcock; the promise was made to Reader. It has been distinctly settled, that to bring the promise within the statute, the promisee must be the original creditor. . . . The debts are totally distinct debts, as well as the debtors. No satisfaction resulted to Malins on account of what passed between Kingham and Reader. Reader was the agent of Malins to accept 17*l*., in satisfaction of the debt and costs in the county court; but he was not his agent to postpone the payment. If Malins had chosen, he might have revoked Reader's authority, between the time of Hitchcock's release and the Saturday; and the payment of 17*l*. would have been no discharge of Malins's claim under the judgment. The payment of the 17*l*., therefore, would not necessarily have been a discharge of Malins's demand; but only a discharge or satisfaction of the contract between Kingham and Reader. The case is clearly not one to which the statute of frauds can apply." Williams, J., concurred, without discussing the peculiar circumstances of this case, on the ground, that the statute applies only to "a promise made to one to whom another is answerable." Byles, J., after concurring with the general doctrine, as laid down by Williams, J., added: "It was contended by the counsel for the defendant, that Reader was the agent of Malins. But the answer is that the transaction

(f) In some of the reports it is said that the plaintiff had actually arrested him, and that he discharged him upon the promise.

was not for his benefit, and he has not recognized Reader's act." Keating, J., said that although some of the cases tended to throw some doubt upon the proposition, the balance of authority was clearly in favor of the rule, that to bring the case within the statute, "the promise must be made to the original creditor." (g)

(g) Although this case presents some novel, and at first sight, startling features; it is believed that a critical examination will show that the decision was correct. The point upon which the case presents the most embarrassment, is the plaintiff's relation to Malins, the judgment creditor; and the question suggests itself whether, in case the 17*l*. had been paid by the defendant, the plaintiff could have put the money in his pocket, leaving the judgment in full force against Hitchcock? The answer is, that although the plaintiff assumed to act as Malins's agent, in accepting the defendant's promise, he had in fact no such authority; but if Malins had subsequently accepted the 17*l*., he would have affirmed the plaintiff's act. But he might have disaffirmed it, and sued the plaintiff for an escape, or a failure to execute the writ; which shows that at the time of the promise, the plaintiff was not his agent. No question arose as to the effect of a subsequent affirmance of the plaintiff's act by Malins; or whether the promise had not been exacted *colore officii*; or whether, if Hitchcock had promised to return to the plaintiff's custody, the defendant's promise would not have been collateral to that of Hitchcock. In the latter respect, this case is very similar to *Tindal v. Touchberry*, 3 Strobbart (South Carolina), 177, A. D. 1848, cited in § 289, as authority upon another proposition, which the court held to be also applicable. It was an action brought by a constable who had levied upon a mare, the property of one June, under a domestic attachment against June, and the plaintiff gave up the mare to June, upon a verbal promise of the defendant, which was construed by the court to mean that he would "stand security," that the mare should be delivered to the plaintiff the next day, or pay the debt, amounting to \$67.47. On the trial, the defendant objected that the promise was within the statute; but the plaintiff had a verdict for \$40, the value of the mare. The court refused a motion for a new trial, on the ground that the debt was discharged by the levy; and also because the contract was not an engagement, that June should deliver back the mare, but that the defendant would do so. It was said that the bailment was made to the defendant, and not to June, the latter having made no promise whatever; and the evidence showing that on the contrary, he was endeavoring to recover the mare forcibly. As a contrast to *Reader v. Kingham*, we append a statement of a New York case, *Bennett v. Pratt*, 4 Denio, 275, A. D. 1847. There the plaintiffs had procured a summons, to be issued against one Crosby by a justice of the peace, to collect a demand of \$4.09, and had placed it in the hands of a constable to serve, instructing him not to serve it "if

§ 369. The American authorities generally recognize the rule very clearly, as the same was laid down by Lord Denman in *Eastwood v. Kenyon*, although there are a few decisions, where promises not made to the creditor or any one representing him, have been held to be within the statute, without adverting to the distinction taken by the rule.^(h) The cases, English and American, where the

Crosby would pay or secure the debt and expenses." Crosby procured the defendant to execute the instrument, upon which the action was brought, in these words: "I agree to be security for the payment of J. Crosby's debt, to J. & W. C. Pratt" (the plaintiffs), "to the amount of \$4.09, and the legal costs," etc.; "to be paid in nine months." The constable thereupon receipted the demand to Crosby as paid, and omitted to serve the summons. Crosby at the same time agreed to pay to the defendant the sum which he undertook to pay to the plaintiffs. The plaintiffs recovered judgment in the court below, which was reversed by the Supreme Court, because the defendant's agreement did not express the consideration. It does not appear what were the points made by the counsel on either side; and the opinion contains an elaborate discussion upon the question, whether the writing sufficiently expressed the consideration, under the New York Revised Statutes; and no reference to any of the peculiar features of the case. But here the agreement was made in terms with the plaintiffs; and although the constable perhaps exceeded his authority, they ratified his act by bringing this suit. A grave question arose upon the facts, whether the discharge of the debt was not sufficient to take the promise out of the statute within the fourth rule; but it seems not to have occurred to the court or the counsel. But one of the oldest reported American cases, *Thomas v. Welles*, 1 Root (Connecticut), 57, decided A. D. 1773, is apparently in direct conflict with *Reader v. Kingham*. The report states that "Welles," the plaintiff below, "was a constable of the town of Hartford, and had a rate-warrant and a rate against Jacob Brown, for which he levied upon Brown's body, and was about to commit him to jail: Thomas, in consideration that Welles would suspend any further proceedings that night, assumed and promised, that he would see him forthcoming to said officer the next morning, or he would pay the debt; upon this Welles released said Brown, and Thomas did not see him forthcoming, nor has he paid the debt." The court below, upon demurrer to a plea of the statute of frauds, gave judgment for the plaintiff, which the Superior Court reversed, saying that this was "manifest error; for this is clearly a promise for the debt and duty of another."

(h) *Mundy v. Ross*, 3 Green (N. J.), 466, A. D. 1836; *Campbell v. Findley*, 3 Humphrey (Tennessee), 330, (1842); *Nixon v. Van Hise*, 2 Southard (New Jersey), 491, (1819.)

promise consisted of an indemnity against a liability, thereafter to be incurred by the promisee, on the faith of the promise, depend upon the same principle; and those where no other person than the promisor would be liable, in any event, to the promisee, might appropriately be cited here; but they are so intimately connected with the cases where the promise was to indemnify the promisee, under such circumstances that he would also have a remedy against another person, which are irreconcilably conflicting, that it has been deemed better to consider both classes of cases together in another place.⁽ⁱ⁾ We will now proceed to the examination of the American decisions, upon promises to discharge a debt previously contracted, or other liability previously incurred by the promisee; confining our citations to the cases, where the action is brought by the other party to the contract. The question whether the creditor can maintain an action for the breach of such a promise; and, if so, whether the statute of frauds requires it to be proved by a writing, when the attempt to enforce it is made in that form, will be the subject of examination in the next succeeding chapter.

§ 370. It was said, a few pages back, that the principle under discussion was recognized in the United States, for many years before Lord Denman's decision in *Eastwood v. Kenyon*. It is in fact to be found distinctly stated in *Allaire v. Ouland*, 2 Johnson's Cases, 52, decided in New York in the year 1800; which will be again referred to with the other cases, where the promise was to indemnify the promisee, against a liability thereafter to be incurred. But it was apparently overlooked in the next case, *Myers v. Morse*, 15 Johnson, 425, A. D. 1818, where another reason was given for the decision, although the facts called for the application of this principle. There the court sustained an action upon a verbal promise to indemnify the plaintiffs against their previous indorsement of a third person's note, under Chancellor Kent's third proposition in

(i) Chapter thirteenth.

Leonard v. Vredenburg, (j) holding that there was a new and original consideration of benefit to the promisor, which sufficed to take the promise out of the statute.

§ 371. But the correct rule was again stated and applied by the Supreme Court of New York in *Conkey v. Hopkins*, 17 Johnson, 113, decided A. D. 1819. There the plaintiff had bound himself to pay a certain sum annually to the trustees of a religious society, towards the support of the defendant, as a minister of the gospel; and afterwards the defendant, for the consideration of \$25, verbally agreed to save the plaintiff harmless, and indemnify him against the subscription; the trustees sued the plaintiff upon his subscription, and recovered judgment against him; whereupon this action was brought upon the defendant's promise of indemnity; and the court held that it was not within the statute, on the ground that the defendant was not bound to the trustees.

§ 372. The rule was again laid down, even more distinctly, in *Chapin v. Merrill*, 4 Wendell, 657, A. D. 1830, which will also be found in the thirteenth chapter, and again, in the same year, when *Eastwood v. Kenyon* was decided (1840), by the judgment of the Court of Errors of New York in *Mersereau v. Lewis*, 25 Wendell, 243. There the plaintiffs sued upon a verbal agreement, that the defendant would undertake the collection of the debts due to a late firm, composed of himself and one Jacobus, and assume as his own all that he should not have put in suit by a certain time; the plaintiffs, who were the assignees of the interest of Jacobus, agreeing that they would pay one-half of certain debts due by the firm, particularly specified. It was held by the Court of Errors that the defendant's promise was valid, because the statute did not relate "to contracts made with the debtor himself, to assume the responsibility of paying his debts, or to furnish him the means of pay-

(j) See § 63.

ing them, founded upon a valid consideration between such debtor and the person promising," the Chancellor citing as authority *Eastwood v. Kenyon*, decided in the earlier part of the same year. The case is somewhat obscure, but probably the objection was that the plaintiffs' agreement was within the statute; and therefore, that the defendant's agreement was without consideration.

§ 373. In *Westfall v. Parsons*, 16 Barbour, 645, decided by the Supreme Court of the same state in 1853, the defendant was the first indorser, and the plaintiff the second indorser of a promissory note, made by one Parsons; and before its maturity they verbally agreed with Parsons, in consideration that he would make an assignment, preferring the note in question, that they would take up the note, and look to the assignment for reimbursement. Parsons made the assignment accordingly; and the parties to this action provided for the payment of the note before its maturity; whereupon the plaintiff brought this action to recover the sum paid by him, claiming that the agreement was void by the statute of frauds, and that he was entitled to recover against the defendant, as the first indorser of the note. There was another point which is not material here, but upon this point, the court held that the relation of the parties was changed by the agreement; that it bound them jointly, so that the plaintiff could recover no more than enough, to enforce the defendant's liability to pay one-half of the note; and that the agreement was not within the statute because it was an agreement with the debtor and without the creditor.

§ 374. In Massachusetts the principle was laid down in the year 1821 in the case of *Colt v. Root*, 17 Massachusetts, 229. There the defendant was a member of a manufacturing corporation, and as such made liable by statute, in certain events, for the payment of its debts; and the plaintiff held a dishonored note against the corporation, upon which he wished to raise the money, in order to

enable him to pay a note due by him to one Janes. It was thereupon agreed between the plaintiff, (who was about to leave the state,) and the defendant, that the plaintiff, instead of suing the company upon the note, would deposit it in another's hands; and if Janes sued the plaintiff upon the note held by him, the defendant would indemnify the plaintiff from all cost and harm. The plaintiff deposited the note accordingly, and went away; and during his absence he was sued by Janes, and judgment recovered and execution issued against him, of which the defendant had notice; and, he neglecting to pay the execution, the plaintiff's personal property was sold thereon. In an action upon the defendant's promise, the court held that the promise was not within the statute, Parker, C. J., saying: "It is not a promise to pay the debt of another; it is a promise to pay to another the debt of the plaintiff; and is in principle, like the case of a debtor giving money to another to pay his debt, and he neglecting to do it."

§ 375. In *Weld v. Nichols*, 34 Massachusetts (17 Pickering), 538, A. D. 1836, the plaintiff and the defendant had entered into an indenture, whereby the plaintiff agreed to sell, and the defendant to purchase, a certain house lot in Boston, by warranty deed, free from all incumbrances; and the defendant agreed to indemnify the plaintiff against all claims, in consequence of a brick wall on the adjoining lot being partly upon the plaintiff's lot. Subsequently the plaintiff made the conveyance, and in consideration that he would cancel the indenture, the defendant agreed verbally that if any claim should be enforced against the plaintiff concerning the wall, the defendant would reimburse the same to the plaintiff. The defendant having used the wall, the plaintiff was sued for his share of the expense of erecting it; and having been defeated, he brought an appeal at the request of the defendant, upon which he was again defeated. In an action upon the promise it was held that it was not within the statute, either as relating to an interest in lands, or as a promise

to answer for the debt of another; nor was it contrary to the covenants of the deed; and the cancelling of the indenture was a sufficient consideration to sustain it.

§ 376. The case of *Pike v. Brown*, 61 Massachusetts (7 Cushing), 133, A. D. 1851, already cited under another point,^(k) was also decided on the ground that the promise was to the debtor and not to the creditor, as well because it was implied by law. And in *Alger v. Scoville*, 67 Massachusetts (1 Gray), 391, A. D. 1854, where the plaintiff transferred to the defendant certain shares of stock in a manufacturing company, and a note he held against the company; and the defendant, in consideration thereof, conveyed to him a farm, and verbally agreed to indemnify him against his indorsements upon certain outstanding notes of the company, not then payable, it was held that the promise was not within the statute. Shaw, C. J., said, that there was no debt then due to any body; but if there had been an absolute debt, it was "a promise to pay the plaintiff's own debt, which is equivalent to a promise to pay the money to him, by which he himself could discharge the debt." And he referred to the previous case of *Preble v. Baldwin*, 60 Massachusetts (6 Cushing), 549, A. D. 1850, where a promise by a grantor of land to the grantee to pay taxes upon the land, which were not yet assessed, was held not to be within the statute, Wilde, J., assigning the same reason for the decision which has been heretofore given in these pages, namely, that the words "another person" refer to a third person.

§ 377. The same result was attained in *Soule v. Albee*, 31 Vermont, 142, A. D. 1858, although the decision was put upon a more questionable ground. This was an action to foreclose a mortgage, given by the defendant Albee to the plaintiffs, to indemnify them against all sums which the plaintiffs or A. G. S. should become liable to pay for the mortgagor, "in consequence of signing or

(k) See § 98.

otherwise ;" and the question was whether a certain sum, paid by the plaintiffs to A. G. S., was included in the condition of the mortgage. It appeared that Albee had been sued by one Buck, and a trustee process had been issued in favor of Buck against A. G. S., who owed Albee \$500 ; while that suit was pending, Albee, wishing to collect the money due to him, procured the plaintiffs to make a verbal agreement with A. G. S., that if the latter would pay Albee the \$500, they would pay him whatever judgment should be rendered in favor of Buck against him as trustee of Albee ; relying upon which promise, A. G. S. paid Albee the money. Afterwards and before Buck's suit was determined, the mortgage in question was given, for the purpose, as the case states, of protecting the plaintiffs against their liability to A. G. S., as well as a liability which they had incurred by signing a certain note for Albee. The suit brought by Buck terminated in a judgment in his favor against Albee, and a judgment on the trustee process against A. G. S. ; and the plaintiffs, being called upon by the latter, paid an execution issued thereon against him. It was objected in this suit, that as the plaintiffs' promise to A. G. S. was void by the statute of frauds, the payment to him was voluntary, and consequently the mortgage did not include their demand ; but the court held that the payment by A. G. S. to Albee, was virtually advancing the money to the plaintiffs, upon their promise to pay it ; and that such promise was not within the statute of frauds, but was a valid undertaking, which A. G. S. might have enforced against the plaintiffs ; so that it came within the terms of the mortgage.

§ 378: So in *Fiske v. McGregory*, 34 New Hampshire, 414, A. D. 1857, the plaintiff had sold his real and personal property at auction, and certain land had been struck off to one F. F. At the time when the land was offered, the auctioneer stated that there was a mortgage upon it to one Keyes, and bids were invited for the value of the land beyond the mortgage. Other parol evidence was given, tending to show an understanding, that the purchaser should pay

Keyes. The defendant was present at the sale, and afterwards purchased the bid of F. F. for \$25; and a deed was thereupon executed by the plaintiff to the defendant, with the usual covenants for title, excepting as against the Keyes mortgage. This action was brought for breach of a promise to pay the mortgage, and the plaintiff had a verdict, which the court refused to set aside. It was held that the evidence warranted the jury in finding, that the defendant was to take the place of F. F., and made the promise declared upon; and that inasmuch as it was a promise made to the debtor himself and not to the creditor, to which the creditor was not privy, it was not within that part of the statute relating to a promise to answer for the debt of another. And the court also held that it was not within that part of the statute relating to a contract for the sale of lands.

§ 379. In Connecticut the principle was correctly laid down by Gould, J., as early as 1816, in *Stocking v. Sage*, 1 Connecticut, 519, although the other judges put the decision upon different grounds; and it was distinctly affirmed by the judgment of the court in *Pratt v. Humphrey*, 22 Connecticut, 317, A. D. 1853. There the plaintiff's declaration alleged, in substance, that the defendants were administrators on the estate of one Andrew Pratt; and that in consideration that the plaintiff would forbear to present for allowance, a debt of \$1,200, due to him by the deceased, the defendants promised to him to pay whatever debts he, the plaintiff, might owe, to the amount of \$200; and to apply that amount of money to the liquidation of the plaintiff's debts; and furnish him that amount of money to be applied to the payment of his debts; concluding with an allegation of a breach. To which declaration the defendants pleaded that there was no note, etc., in writing, and the plaintiff demurred to the plea. The court below gave judgment for the plaintiff upon the demurrer, which was affirmed by the Supreme Court, Storrs, J., saying, upon the point that this was a promise to answer for the debt, etc., of another: "The promise here was made, not to the

creditors of the plaintiff, but to himself, to pay debts which he owed to such creditors. Whether the terms of the statute are, or are not, sufficient to embrace such a promise, the object and occasion of it show plainly, that it was intended to apply only to promises made to the person to whom another is answerable, and that such therefore is its true construction." The case is cited elsewhere upon the other point taken, namely, that it was a special promise by administrators to answer damages out of their own estates. (7)

§ 380. This principle was also fully recognized in Kentucky, in the recent case of *North v. Robinson*, 1 Duvall, 71, A. D. 1863. There the petition alleged, in substance, that the plaintiff had subscribed for \$2,000 of stock in a certain railroad company; for which he had executed to the company a mortgage and two bonds, payable in ten years, with semi-annual interest; that the company subsequently passed a resolution, that all subscribers, in the plaintiff's situation, might reduce their stock one-half, by paying thirty one per cent of the reduced subscription, at a specified time, and agreeing to pay the balance of the reduced subscription whenever called upon; that the defendant, being interested in the company, urged the plaintiff to accept those terms; that the plaintiff hesitated so to do, on the ground that he did not believe that his acceptance would have the effect to release him from his original subscription; that in order to induce him to accept the terms the defendant undertook to save him harmless on account of his original subscription. And that relying upon such promise he accepted the terms, and paid the thirty one per cent within the specified time, and the balance of the \$1,000 when called upon; but the company had enforced the original subscription, and recovered judgment for the remainder of it, which the plaintiff had been compelled to pay. A demurrer to this petition was sustained in the court below, on the ground

(7) See § 28.

that there was no allegation that the promise was in writing. On appeal the judgment was reversed, on the ground that the promise was not made to the company, but to the debtor himself, the court remarking that this doctrine "may be now regarded as conclusively settled both in England and in this country."

§ 381. Other American cases (besides those in the thirteenth chapter) in which it has been held that a promise made to the debtor was not within the statute, and it has accordingly been enforced between the original parties to the contract will be found in the note. (*m*) This constitutes for obvious reasons, the state of facts upon which the question generally arises. But occasionally it happens, as in *Reader v. Kingham*, that the promisee was neither the creditor nor the debtor.

§ 382. Thus in *Perkins v. Littlefield*, 87 Massachusetts (5 Allen), 370, A. D. 1862, the defendant, who was the owner of a vessel, requested the plaintiff to pay to certain ship chandlers a debt for supplies, contracted by the master of the vessel, promising to repay the amount; and it was held, (overruling the exceptions taken at the trial,) that the promise was not within the statute. Bigelow, J., delivering the opinion of the court, said, "It was not a promise to pay the debt of another, in the sense in which those words are used in the statute. Such would have been the case, if the defendant had agreed to pay the debt to the persons to whom it was originally contracted, and they had brought an action upon such promise. It is the well settled doctrine, that the provision in the statute is applicable only to promises made to the person to whom another is answerable." The learned judge added that

(*m*) *Hardesty v. Jones*, 10 Gill and Johnson (Maryland), 404, A. D. 1839; *Rice v. Carter*, 11 Iredell (North Carolina), 298 (1850); *Rider v. Riley*, 2 Maryland Chancery Decisions, 16 (1849); *Howard v. Coshov*, 33 Missouri, 118 (1862); *Tibbetts v. Flanders*, 18 New Hampshire, 284 (1846); *Shook v. Van Meter*, 22 Wisconsin, 532 (1868).

this was a new, distinct and independent agreement with the plaintiff, to repay money expended by him at the instance of the defendant, and upon his promise to repay it; in which aspect of the case it was wholly immaterial whether the defendant was or was not liable for the original debt.(n)

§ 383. It may therefore be safely said, that the rule is well established, in England and the United States, that in order to render the statute of frauds at all applicable, to a promise to assume the debt or duty of another person, the promisee must be the person to whom the debt or duty is owing. Of late years, some obscurity has been cast around this principle, by the general language used, not only in some of the cases where the right of a creditor to enforce such a promise is denied,(o) but in others where it is argued that every promise to assume a pre-existing debt, of a person other than the promisor, is within the statute, if the debt subsists after the promise; unless the consideration upon which it was founded, consisted of a fund furnished by either the creditor or the debtor, for the purpose of paying the debt.(p) But whatever may be the correct rule, with respect to the questions directly involved in those cases, the general language used in the course of the argument, was not intended, it is believed, to go beyond those questions; certainly not to infringe upon the principle now under examination.

§ 384. The decisions which hold that the promisee may sustain an action, upon a verbal promise to indemnify him against his own debt, when it was founded upon any

(n) See also *Pearce v. Blgrave*, ante, § 163. The case of *Olipphant v. Patterson*, 56 Pennsylvania, 368, A. D. 1867, is of the same general character. There the plaintiff had paid certain debts of a firm of which the defendant was a member, at the defendant's request; and the objection that the statute prevented a recovery, without joining all the members of the firm, was overruled.

(o) Cases in chapter xii, article iii.

(p) For instance, *Fullam v. Adams*, 37 Vermont, 391.

valuable consideration, are too numerous and of too high authority to be overthrown by general dicta; and it is believed that no attempt to do so by direct decision, would command the approbation of the profession. We must acknowledge that the principle is sustained by inconclusive reasoning, and that it opens the door to many difficult questions; but after it has been settled for so many years, and approved in so many cases, an attempt to uproot it would involve consequences far more disastrous than any which could possibly ensue from suffering it to remain. And every attempt to escape from the results to which it legitimately leads, by engrafting arbitrary exceptions upon it, will lead to greater perplexity and confusion, than to allow it to be pushed to its logical conclusions; a proposition which we shall have occasion to maintain and apply, in each of the two following chapters.

CHAPTER TWELFTH.

THE SAME SUBJECT CONTINUED — CASES WHERE A CREDITOR SEEKS TO ENFORCE A CONTRACT BETWEEN HIS DEBTOR AND ANOTHER PERSON, PROVIDING FOR THE PAYMENT OF THE DEBT BY THE LATTER.

ARTICLE I.

The question arising under the statute stated, and examined upon principle; the English rule with respect to the creditor's right to sue.

§ 385. Before proceeding to the discussion of the other classes of cases governed by the rule, that a promise to pay the debt of another is not within the statute, unless it is made to the creditor; it is necessary to consider a question which we regard as depending upon that rule, as the same is explained and applied in the cases examined in the last chapter; namely, in what manner the statute affects the right of a creditor to maintain an action, for the breach of a promise to pay the debt, which has been made to his debtor, upon a consideration proceeding from the latter. It will be seen, that although the step between an action upon such a promise by the debtor, and one by the creditor, is but short, its consequences are quite momentous, involving the indirect accomplishment of a result, which the statute clearly forbids to be accomplished directly. Indeed it seems, at first sight, a mere evasion of the statute to say, that when it has confessedly forbidden an action to be maintained by A, upon B's verbal promise, made to him, to pay him a debt due to him by C; it will nevertheless permit A to maintain such an action, provided B has made the same promise to C. But perhaps, upon a further examination of the subject, this will not appear so unreasonable.

§ 386. The doubts upon this question are confined to the United States; for in England it is altogether prevented from arising, not only because it is diametrically opposed to the second proposition deduced from the rule in *Tatlock v. Harris*; (a) but also because it contravenes the rule of the common law, that a stranger to the consideration cannot maintain an action upon a contract. The latter rule has been somewhat relaxed by the English courts in modern times; but not sufficiently to permit a creditor to sue, in the case now under examination. This appears to be entirely settled by the modern English decisions; although the American authorities in support of the action are founded, more or less directly, upon certain early English cases, which were supposed to establish the principle, that a person for whose benefit a contract was made, might enforce it at law, although he was a stranger to the contract and to the consideration. (b)

(a) See ante, § 326. But an attempt was made to reconcile it with that proposition in *Warren v. Batchelder*, 16 New Hampshire, 580.

(b) The principal of these is *Dutton and wife v. Poole*, 29 Car. II, in the King's Bench, reported in 1 Ventris, 318 and 332; 3 Keble, 786, 814, 830, and 836; 2 Levinz, 210; and T. Jones, 102; and affirmed upon writ of error to the Exchequer Chamber, T. Raymond, 302. These various reports are very discordant respecting the minor incidents of the case, some of them representing that facts were before the court, the absence of which is stated in others, to have formed grounds of objection to the recovery. As it came up on a motion in arrest of judgment, the contents of the declaration are all that is really material; and no doubt they are most correctly given in the report in Raymond, which professes to contain an abbreviation of the pleading itself. The action was assumpsit; and the substance of that part of the declaration upon which the question arose, was, that whereas Sir Edward Poole, father of Grizil Dutton, the female plaintiff, was possessed of certain timber trees, growing in a certain park, etc., and intended to cut down and sell the same to raise portions for his children; the defendant, in consideration that Sir Edward would forbear from cutting the trees, "did promise the said Sir Edward, that he, the said defendant, would well and faithfully pay to the said Grizil, 1,000*l*;" that Sir Edward did not cut the trees, but the defendant did not pay Grizil while sole, or the plaintiffs, or either of them, after their marriage, the said sum of 1,000*l*., although, etc. We also gather from the other reports, as part of the history of the case, that the trees were in a park attached to an estate, of which Sir Edward was tenant

§ 387. It is evident that the question, whether the statute of frauds permits such an action to be maintained, is not necessarily connected in any manner with that arising at common law. Indeed the latter question is frequently presented in such a form, that the statute can have no application; as, for instance, where the contract is evidenced by a writing expressing the consideration; or, being verbal, is for the performance of some act for the benefit of the plaintiff, other than the payment of a debt due to him by the other party. But in many cases the controversy arises upon a promise, either verbal, or contained in some writing which does not satisfy the requirements of the statute, to pay a debt due from the promisee to the plaintiff; and then the effect of the statute and the common law question are both involved in the decision, and discussed in the opinion, the one reflecting upon the other. Again, the cases which hold that the statute is

for life, without impeachment of waste; that the defendant was his son and the remainderman; and that Grizil's mother, who was the executrix of Sir Edward, was the only witness, "so cannot bring the action as on a promise to him." After verdict for the plaintiff, a motion was made in arrest of judgment, and upon the argument the judges appeared to be divided; at a subsequent term two new judges had been made, and the cause was argued anew. The substance of the arguments, which, as well as the remarks of the judges, are given at considerable length, was, for the defendant, that the action should have been brought by the father or his executors, because the daughter was not privy to or interested in the consideration; that the case was different from many others put, as for instance, where a father promises J. S., that if the latter's son will marry his daughter, he will give him 1,000*l*.; there the son might sue, for he was privy to the consideration; but here the daughter had done nothing, and she could not have released the defendant; but Sir Edward might at any time have released him, or he might have cut the wood after the promise. The plaintiff had judgment: according to 1 Ventris, 332, Scroggs, C. J., said: "It might be another case, if the money had been to have been paid to a stranger; but there is such a nearness of relation between the father and child, and 'tis a kind of debt to the child to be provided for, that the plaintiff is plainly concerned." This substantially accords with the report in Levinz, which adds, "for the ~~husband~~ hath the benefit, by having of the wood, and the daughter hath lost her portion by this means." But Sir Thomas Jones states that the ground of the decision was merely that "the benefits belong to the daughter, and she may

inapplicable to such promises, are not in harmony respecting the reasons for its failure to apply; and the discussion

release it." The report of the case, in the Exchequer Chamber, says only, with respect to the reason for the decision, that Pollexfen, for the plaintiff, argued that "the action is maintainable by the party to whom the promise was made, or to" (by) "the cestuy que use the promise was, indifferently; and of this opinion were all the justices and barons, and judgment was affirmed." T. Raymond, 302. The case has been much criticised; and those who deny the creditor's right to maintain the action, explain it as having proceeded upon the ground taken by Scroggs, and so not to be a precedent where the consideration proceeds from an entire stranger. Other early cases where the beneficiary was allowed to maintain the action, are open to the same criticism. *Sprat v. Agar* (A. D. 1658) cited, together with an anonymous case, in *Bourne v. Mason*, 1 Ventris, 6; *Thomas v. —*, W. Style, 461 (A. D. 1655). But on the other hand, several very strong expressions, and some decisions, may be found scattered through the English reports, down to as late a period as the commencement of the present century, to the effect that the person for whose benefit a contract between others was made, may maintain an action for its breach, irrespective of any relationship which he might bear to the promisee. *Starkey v. Mill*, Style, 296 (A. D. 1651); *Ward v. Evans*, 2 Lord Raymond, 928 (1704); *Martyn v. Hind*, 2 Cowper, 437, see p. 443 (1776); Per Buller, J., *Marchington v. Vernon*, 1 Bosanquet and Puller, 101, note c (1786); Per Lord Alvanley, C. J., *Piggott v. Thomson*, 3 Bosanquet and Puller, 149 and note a (1802). And see *Carnegie v. Waugh*, 2 Dowling and Ryland 277 (1823). But now it is conclusively settled, by the uniform course of the modern English decisions, that a person who is a stranger to the contract and to the consideration, cannot sue for a breach of the contract; and it is debatable whether one who is a stranger to the consideration can sue, even if he was a party to the contract. *Bourne v. Mason*, 1 Ventris, 6 (A. D. 1669); *Crow v. Rogers*, 1 Strange, 592 (1724); *Price v. Easton*, 4 Barnewall and Adolphus, 433, and 1 Nevile and Manning, 303 (1833); Per Maule, B., *Tollit v. Sherstone*, 5 Meeson and Welsby, 283, and 7 Dowling's Practice Cases, 455 (1839); Per Patteson, J., *Thomas v. Thomas*, 2 Queen's Bench, 859 (1842); Per Parke, B., *Jones v. Robinson*, 1 Exchequer, 456 (1847), and per totam curiam, according to 11 Jurist, 934; *Scott v. Pilkington*, 2 Best and Smith, 11, (A. D. 1862); S. C., 8 Jurist, N. S., 557, 31 Law Journal, N. S., Q. B., 81, 6 Law Times, N. S., 21. The same principle is to be found in a still more recent case in the Irish Common Pleas, *McCoubrey v. Thomas*, 2 Irish Reports, Common Law, 226, and 16 Weekly Reporter, 367 (1868). See also the cases raising an exception to the rule, where the defendant has received money from another person to the use of the plaintiff; in which case it seems that the action can be maintained, only

of that question involves an inquiry into the principles, upon which the action is sustained at common law. It

after the defendant has actually promised the plaintiff to pay him the money, or in some equivalent form recognized the plaintiff as his creditor. *Harris v. De Bevoise*, 2 Rolle, 440 (A. D. 1624); *Williams v. Everett*, 14 East, 582 (1811); *De Bernales v. Fuller*, id. in note to p. 590; *Lilly v. Hays*, 5 Adolphus and Ellis, 548, 1 Neville and Perry, 26, and 2 Harrison and Wollaston, 338 (1836); *Moore v. Bushell*, 27 Law Journal, N. S., Exch., 3 (1857). The last vestiges of authority which modern decisions suffered *Dutton v. Poole* to retain, were swept away by the recent case of *Tweddle v. Atkinson*, Executor, etc., 1 Best and Smith, 393, (S. C., 8 Jurist, N. S., 332, 30 Law Journal, N. S., Q. B., 265, 9 Weekly Reporter, 781, 4 Law Times, N. S., 468), decided in the Queen's Bench, A. D. 1861. There the declaration stated in substance, that in consideration of an intended marriage between the plaintiff and the daughter of William Guy, the defendant's testator, Mr. Guy verbally promised the plaintiff to give his daughter a marriage portion, and the plaintiff's father also verbally promised to give the plaintiff a marriage portion; and after the consummation of the marriage, neither of the said verbal agreements having been performed, the plaintiff's father and Mr. Guy, as a mode of giving effect to their verbal promises, and each acting for the benefit of his child, and for the purpose of providing and procuring the other to provide a marriage portion for his child, entered into an agreement in writing with each other, a copy of which was set out in the declaration; being a mutual promise, on the part of each of the contracting parties, to pay to the plaintiff a certain sum of money, at a time therein mentioned; and containing further a stipulation, that the plaintiff might sue the parties "for the aforesaid sums hereby promised and specified." The declaration then averred, that the plaintiff and his wife afterwards ratified and assented to that agreement; and concluded with the necessary formal allegations. The defendant demurred to this declaration, and the plaintiff's counsel cited *Dutton v. Poole*, *Thomas v. —*, and the two cases in *Bourne v. Mason*. Wightman, J., said: "Some of the old decisions appear to support the proposition, that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of these cases is that cited in *Bourne v. Mason*, in which it was held that the daughter of a physician might maintain assumpsit, upon a promise to her father, to give her a sum of money, if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established, that no stranger to the consideration can take advantage of a contract, although made for his benefit." Crompton, J., and Blackburn, J., delivered opinions to the same effect; so there was judgment for the defendant.

will therefore be impossible fully to examine the question arising under the statute, without also bestowing considerable attention upon the common law rule.

§ 388. Let us therefore inquire whether those cases, which affirm that the creditor may maintain the action at common law, advance any theory for that purpose, which in any way affects the question arising under the statute of frauds. It has been sometimes said that the promise may be regarded as having been made to the debtor, in the character of an agent of the creditor, and that the latter, by bringing the action, affirms the assumed agency.^(c) If the creditor's action rested upon that idea, there would be no feature to distinguish a case of this kind from one where the promise was made to him directly, without any participation by the debtor; and consequently every attempt of the creditor to maintain an action thereon, when it was verbal, must be defeated by the objection arising under the statute. And again, it would be impossible for the debtor to maintain an action upon the promise, under any circumstances.^(d) But the theory of an agency in the debtor has not been so generally advanced as to call for an elaborate discussion; it is supposed to be derived from a remark in one of the English cases, referring to a supposed agency on the part of the defendant when he has received money for the use of the plaintiff,^(e) and to be entirely inapplicable where the liability assumed by the promisor was such as to create a simple debt.^(f)

(c) Per Johnson, C. J., and Denio, J., in *Lawrence v. Fox*, 20 New York, 268, post, § 412, and note; Per Hogeboom, J., *Seaman v. Hasbrouck*, 35 Barbour, 151, in note to § 412.

(d) All this is very clearly shown by Robertson, C. J., in *Connor v. Williams*, 2 Robertson (N. Y.), 46.

(e) *Lilly v. Hays*, 5 Adolphus and Ellis, 548.

(f) Professor Parsons, in the fifth edition of his work on *Contracts* (Volume 1, page 468), has added this paragraph to the observation, contained in the earlier editions, that the prevailing rule with us, is that the party benefited may sue: "Indeed it has been held that such a promise is to be deemed made to the third party, if adopted by him,

§ 389. It has been said with greater show of authority that the express promise made by the defendant to the debtor, raises also an implied promise in favor of the creditor(*g*); but it is believed that the expression is used in the sense that a duty or obligation is created, by the actual or constructive receipt of money in consideration of the promise; which enables the creditor to draw to himself the fulfilment of the latter, and to insert the formal allegation of an *assumpsit* in a declaration adapted to the facts; rather than as indicating that the law implies a promise, upon which he may specially declare as having been made to himself. No precedent of such a declaration has come under our observation; on the contrary it has been held that in pleading the promise, it should be stated to have been made to the debtor, according to the fact.^(h) And it is believed that the theory of an implied promise is an unnecessary excrescence upon the doctrine, tending to increase the perplexity in which the whole subject is enveloped. But if the common law action rests upon this ground, it is clear that the statute does not apply, for the latter includes only express promises.⁽ⁱ⁾

though he was not cognizant of it when made." The authorities cited in the note are *Lawrence v. Fox*, 20 New York, 268, and *Steman v. Harrison*, 42 Pennsylvania, 49. Doubtless the reference to *Lawrence v. Fox* is intended for the reasons assigned by the Chief Justice and Denio, J., for concurring with the majority. The case in 42 Pennsylvania does not bear out the observation. It holds merely that a promise to accept a bill of exchange for a fixed amount is equivalent to an acceptance, not only as to the drawer, but as to every person who takes the bill on the faith of the promise; and the rule in the case of an ordinary contract is not alluded to in the opinion.

(*g*) Per Gray, J., in *Lawrence v. Fox*, 20 New York, 268, and cases cited by him, § 412; Per Bigelow, J., in *Brewer v. Dyer*, 61 Massachusetts (7 Cushing), 337, note to § 420, Per Shaw, C. J., *Perry v. Swasey*, 66 Massachusetts (12 Cushing), 36; Per Robertson, C. J., *Connor v. Williams*, 2 Robertson, N. Y., 46.

(*h*) Delaware, etc., *Company v. Westchester County Bank*, 4 Denio, 97; *Barker v. Bucklin*, 2 Denio, 45; *Decker v. Shaffer*, 3 Indiana, 187; *Mason v. Hall*, 30 Alabama, 599. Contra, per Skinner, J., in *Eddy v. Roberts*, 17 Illinois, 508. See remarks upon *Curtis v. Brown*, 59 Massachusetts (5 Cushing), 488, post, § 418, 419.

(*i*) See chapter iv, article i.

§ 390. An examination of the cases contained in the second article of this chapter, will suffice to show that the modern authorities sustaining the creditor's action, agree in holding, that where no trust was raised by the acts of the parties, the right of the creditor to sue depends upon the presumption, that he is the person for whose benefit the contract between his debtor and the defendant was made. And although there is not absolute uniformity among them, the weight of authority is decidedly to the effect, that the action must rest upon that contract; and that the declaration must allege that it was made between the debtor and the defendant; which is entirely repugnant to the notion, that it was a constructive promise to the plaintiff, either by reason of the debtor being his agent, or for any other cause. Consequently the action is not founded upon the idea that the plaintiff was, or at any time became a *party to the contract* either in fact, or by fiction of law; but upon the ground that the law entitles him to acquire a *privity*, with respect thereto, by reason of his interest. These propositions are very distinctly stated in some of the cases, and they are to be inferred from all those which carry much weight of authority. It is believed that a collation of the cases will also result in establishing the proposition, that from the time when the contract is entered into, the right of the promisee therein to release or enforce it is suspended, awaiting the action of the person for whose benefit it was presumptively made; and that an inchoate right to enforce it vests immediately in the creditor, which remains in abeyance until he determines his election, by the commencement of a suit or some other unequivocal act; but reverts to the promisee, if renounced by him. Some of the cases go much further; but this is far enough for our purpose.(j) It results inevitably from these conclusions, that the creditor

(j) According to the decision in *Warren v. Batchelder*, 16 New Hampshire, 580, and apparently also as a consequence of the decision in *Bohanan v. Pope*, 42 Maine, 93, an election to enforce the promise amounts to an extinguishment of the original debt.

was not in any sense a party to the contract, at the time when it was made; and that, if the privity which the law raises in his favor makes him a quasi party, or creates an implied promise in his favor, it does so only from the time when his election to enforce it was determined.

§ 391. If these propositions state truly the rules of law, to be deduced from the authorities sustaining the creditor's right of action, it would seem that all questions arising under the statute of frauds are completely disposed of, by the principle that the statute does not apply to promises made to the debtor. Every additional reason for taking this class of cases out of the statute is superfluous; and if it leads to doubt or confusion its introduction is mischievous.

§ 392. But this principle, if indeed it solves the difficulty, has been overlooked, in the discussions which have arisen, respecting the application of the statute to such promises. This was quite natural in the earlier cases, because the principle itself has been definitely incorporated into the law but recently; and even if it had been established, when they were decided, the uncertainty which long existed, with respect to the grounds of maintaining the action, would have prevented the recognition of its importance. So vague are the reasons assigned in the early cases, for permitting the plaintiff to sue, that in most of them, where, in addition to the promise to the debtor, a subsequent promise was made to the creditor, (either verbal or not supported by any distinct consideration;) we find ourselves at a loss to determine, which of the two promises the court intended to sustain or condemn; and in others we are forced to the conclusion that the court has intentionally blended the promise to the debtor, with a real or fictitious promise to the creditor, in an attempt to make the consideration of one take the other out of the statute. The prevalent opinion then was that the promise, (whatever might be meant by that term,) was not within the statute, because it came within Chancellor Kent's

third class, *(k)* being founded upon a new and independent consideration, moving between the debtor and the promisor. Much error was promulgated under that theory, the traces of which appear to linger, notwithstanding the abandonment in modern times of the theory itself. *(l)*

§ 393. For although most of the modern cases, which sustain the creditor's right to sue, hold, as we have already stated, either expressly or by necessary consequence from their other rulings, that he was neither actually, constructively, nor by retroactive relation a party to the promise; they continue to seek in the consideration of that promise, for some ground on which to take it out of the statute of frauds. And not only do they fail to agree with respect to the true ground; but occasionally, after some peculiar feature of the consideration has been fixed upon, as affording a satisfactory reason for taking the particular promise out of the statute, a corollary is deduced that all cases not possessing that feature are within the statute. Hence arise new and perplexing questions upon this branch of the law, with their usual concomitant, discordance of judicial authority.

§ 394. This will disappear with the recognition of the principle, that all cases of this class are without the statute of frauds, because the promise was not made to the creditor. The only answer to this proposition, is that which seemed to press upon the mind of the court, in a recent case, where it was held that the action could not be maintained upon a verbal promise; *(m)* namely, that the policy of the act requires, that a creditor should not be allowed to enforce such a promise. But at the same time it was conceded, that the reasoning had no application, when the debtor was suing; and that he could maintain

(k) Section 63.

(l) Chapter xvii.

(m) *Clapp v. Lawton*, 31 Connecticut, 95, fully abstracted, and the remarks of the court upon this point quoted in §§ 421, 422.

the action. And this conclusion apparently neutralizes the whole argument. For the statute is directed against certain promises, and not against their enforcement by particular persons; and it would seem that the province of the courts ends, in this respect, with the decision that promises to the debtor are not within its provisions. Such is the precise effect of the cases cited in the last chapter.(n) And the exception proposed to be engrafted upon the general rule, which they establish, will fail of accomplishing, in the great majority of instances, any practically useful purpose. For although the decisions upon the common law question have thrown much obscurity around the debtor's rights, there can be no doubt that he is entitled to enforce the promise, in every respect in which the creditor's ability to do so falls short of completeness. The proposed exception will therefore affect no substantial right, but only turn the parties in interest over to another action.(o) On the other hand, it is believed that if the rule be maintained in its integrity,

(n) It is true, that in nearly all the cases cited in the eleventh chapter, the promise took the form of an indemnity to the debtor. But the language in which the rule is laid down, and the principles upon which it rests, preclude the idea of any distinction arising out of the form of the promise. It would indeed be an absurdity, as respects the rights of the promisee, under the statute, to say that a promise to indemnify him against a debt is governed by one rule, and a promise to pay the debt by another. And in some of the cases the promise was in terms to pay the debt. *Preble v. Baldwin*, 62 Massachusetts (6 Cushing), 549; *Fiske v. McGregory*, 34 New Hampshire, 414.

(o) See *Tibbetts v. Flanders*, 18 New Hampshire, 284 (A. D. 1846). There the action involved a question of title to a table, and the plaintiff proved that one Balch being indebted to one R. Tibbetts, the plaintiff's father, an agreement was made in the presence of Balch, R. Tibbetts, and the plaintiff, to the effect that the plaintiff should take the table and some other furniture belonging to Balch, and guaranty the payment of Balch's debt to R. Tibbetts within a time agreed upon, and if it was not then paid by Balch the furniture should be the plaintiff's. Various objections were taken, one of which was that this verbal agreement was not valid. But the court said: "The plaintiff might, without any writing, upon good consideration, make a valid agreement with Balch to pay his debt. Whether Richard Tibbetts could or could not enforce the guaranty is not material. Balch might enforce the promise to him."

the conflict of authority upon the question whether the statute applies may be reconciled. (*p*)

§ 395. Regarding this principle as controlling the application of the statute, we observe that the question whether a creditor can enforce the promise to the debtor is purely a common law question, whatever may have been the evidence of the promise, and by whatsoever consideration it may have been supported. And for all purposes connected with the application of the statute, it is immaterial whether, after the consideration passed from, and the promise was made to the debtor, the promisor repeated his verbal promise to the creditor, either with or without the intervention of a new consideration; unless the new transaction was of a character to take the case out of the statute, without reference to the original transaction. But where the original agreement was one to which the creditor was a party; that is to say, where he, together with the debtor and the new promisor, participated in an agreement, whereby the latter undertook with the creditor, to pay him the debt; although, if the consideration was furnished by the debtor, the common law question is in substance the same, that arising under the statute of frauds is essentially different. For then the debtor's presence and participation in the contract are entirely immaterial, as far as the application of the statute is involved; and the promise, having been made to the creditor, must, if verbal, stand or fall by the same rules which govern other verbal promises to pay a debt due by another to the promisee. We have therefore severed from this class of cases, those presenting the feature of a tripar-

(*p*) In *Clapp v. Lawton* the suggestion to which we have referred, was made incidentally and disposed of without much consideration. Of the other cases which assert that the statute applies to such an action, *Shoemaker v. King*, 40 Pennsylvania, 107, was decided upon the idea that the creditor's action depended upon an implied promise to him; and in *Curtis v. Brown*, 59 Massachusetts (5 Cushing), 488, the proposition referred to was not suggested, nor could it properly have influenced the decision, as the pleadings stood.

tite agreement, which have been generally, although erroneously, confounded with those where the debtor and the promisor were the only parties to the contract. They consist principally of a class where the consideration was a fund placed in the promisor's hands by the debtor; which are fully examined in a subsequent chapter, under the seventh rule.(q)

§ 306. With these preliminary remarks, we proceed to the examination of the cases, where the debtor and the promisor were the only parties to the contract; confining ourselves in the text, to those where the application of the statute of frauds formed the ground of the decision; except in a few instances, where the facts involved such an adjudication, although the question was not expressly passed upon; or the ground of the decision, upon the common law question, has an important bearing upon that arising under the statute. For obvious reasons we shall be compelled to select certain cases as types of the class to which they belong. Others will be cited in the notes, where also will be found the cases involving only the common law question; the citation occasionally extending itself into an abstract of the case, where the particular point decided bears upon some of the numerous and perplexing questions, which incidentally arise from the prevalent American doctrine, summed up in the expression "that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach."(r)

(q) Chapter fifteenth, article third. There are nevertheless a few cases cited in the succeeding articles, where the agreement was made between the three; but as the facts did not call for the application of any rule which would take them out of the statute, as promises made to the creditor, they are left with the others, where the promise was made to the debtor.

(r) Gray, J., in *Lawrence v. Fox*, 20 New York, 268, says that this principle "concisely states the case in hand." (p. 274.) But although the embarrassing questions, referred to in the text, mostly relate to the rights of the party who is summarily ousted by this doctrine, from the control of his own contract, it is not always easy to ascertain the principle upon which it is determined, whether a particular person is deemed to be the

ARTICLE II.

American cases holding that the statute does not apply to the action.

§ 397. In MAINE, the rule that neither the common law nor the statute of frauds interposes any obstacle to the creditor's right to recover, upon the defendant's promise to the debtor that he will pay the debt, has been settled by a series of decisions, commencing in 1827 with *Dearborn v. Parks*, 5 Greenleaf, 81. There the plaintiff sued as treasurer of the Monmouth academy, for money had and received by the defendant to the use of the academy; and it appeared that one Heald had purchased land from the academy, and had given his notes for the purchase money; and that before the notes became payable, he sold the land to the defendant, who retained enough of the consideration money to pay the notes, and promised Heald to pay them. Afterwards, Heald having died, the defendant said that he had paid him in another way. There was no

one for whose benefit the contract was made, so as to entitle him thus to draw to himself the exclusive right to sue for its breach. It seems to be generally settled that where the contract is to pay a debt, the creditor is presumed to be the person intended to be benefited; although, as a matter of fact, it very rarely happens that his interests had any influence on the mind of the parties, their purpose being generally to take care of the debtor merely. And the presumption has been asserted in words so strong, that it is not probable that the courts would listen to evidence tending to overthrow it. In Missouri alone has there been any attempt to ascertain, whether the parties really had the benefit of the creditor in view; and this the court seeks to discover, not from parol evidence, but from the contents of the instrument itself. (See § 417.) It has been held, however, that a surety for the promisee cannot avail himself of the promise. Thus in *Hoffman v. Schwaebe*, 33 Barbour (N. Y.), 194, A. D. 1860, the plaintiff was surety for one Miller, on two promissory notes, given by Miller upon the purchase of a contract for land; and before the maturity of the notes, Miller assigned the contract to the defendant, upon his verbal agreement to pay the notes. This he neglected to do, and the plaintiff was compelled to pay them; whereupon he brought this action to recover the amount paid by him. It was held by the New York Supreme Court, that although the promise was valid, and not within the statute of frauds, the plaintiff could not recover upon it; because he was not a party to the contract, nor was it made expressly for his benefit. See also *Hicock v. McKay*, 78 Massachusetts (12 Gray), 218.

proof of any promise to the plaintiff, or to any other person in behalf of the academy. A verdict having been found for the plaintiff, subject to the opinion of the court, it was held that the promise was not within the statute of frauds, because it was merely to pay a debt of the promisor; and also that the plaintiff could sue upon the promise, notwithstanding the objection of want of privity.

§ 398. The case of *Rowe v. Whittier*, 21 Maine, 545, decided A. D. 1842, recognizes the same rule; but the court refused to sustain the action, apparently because the promise was not made to the debtor, but to the plaintiff; although the opinion is not very clear, and it asserts one proposition which is not law. There the defendant had proposed to one Patten to settle a lawsuit pending in favor of Patten, against him, by giving to Patten, security for the debt, to which Patten assented, provided the defendant would pay his expenses; on the defendant asking what would be the amount of the expenses, the plaintiff, who was the attorney for Patten in the suit, made out his bill to Patten; and the defendant in the presence of Patten, then promised the plaintiff to pay it, and the plaintiff answered that that would be satisfactory, whereupon the security was given, and the suit discontinued. The bill was for taxable costs and commissions; the defendant had paid the costs; and this suit was to recover the commissions. It was held that the plaintiff could not recover. The opinion stated that if the defendant had been under any liability to Patten for the commissions, the plaintiff might have recovered upon the promise within the principle of *Dearborn v. Parks*; but Patten was liable to the plaintiff therefor, and he could have recovered against the defendant only the taxable costs, if the suit had proceeded to judgment; consequently as to the commissions the defendant's promise was without consideration. It proceeds to say that even if the plaintiff had discharged Patten in consideration of the defendant's promise, the latter would not have been obligatory under the statute of frauds, without a memorandum in writing.

§ 399. In *Todd v. Tobey*, 29 Maine, 219, A. D. 1848, the plaintiff, with R. M. T. and others, had jointly guarantied the payment by one Haycock of a bill of goods purchased from one Hale; and the defendant had afterwards purchased Haycock's stock of goods, and agreed with him to pay Hale. Then Hale called upon the guarantors for payment, and they referred him to the defendant, who verbally promised R. M. T. to settle the demand. He failed to do so; and the plaintiff paid his proportion of the amount, and the like sum for R. M. T.; after which the defendant again promised R. M. T. to pay the demand. Still later a person employed by the defendant to settle his accounts with the plaintiff, allowed the amount so paid by the plaintiff for his proportion, as an item in his favor in certain accounts between the parties; leaving a balance due to the plaintiff, to recover which this action was brought; whereas if that sum had not been allowed there would have been a balance due to the defendant. The settlement of the account was in writing, the agent having signed the defendant's name at the foot of a statement thereof. The defendant having been shown by the agent a copy of this statement assented to it. There was no evidence of any direct promise by the defendant to the plaintiff, except what might be inferred from these facts. The case came before the court upon a statement of facts, upon which judgment was ordered for the plaintiff. The court in their opinion refer to the settlement of the accounts between the parties; but place their decision distinctly upon the ground that the defendant's promise to Haycock was not within the statute of frauds, because it was upon a new consideration moving between them, and that the person for whose benefit it was made would be entitled to enforce it. That person was Hale; and he had two remedies besides the liability of Haycock; namely, one against the defendant, and one against the plaintiff and his fellow guarantors. He availed himself of the latter. After the guarantors had paid the demand, Haycock would be liable to them; and if he had paid them, he would have had a remedy against the defendant.

“The law applied to the facts admitted, authorizes them to reach this object directly, instead of being obliged to resort to the circuitry of action supposed.”(a)

§ 400. In NEW HAMPSHIRE a ruling has been adopted, without special reference to the question arising under the statute of frauds, which, if followed elsewhere, will not only

(a) Here the defendant's promise, through his agent, to the plaintiff, appears to have been resorted to in support of the action; but only to avoid a technical objection to maintaining it. The validity of the transaction under the statute of frauds was made to depend upon the circumstances attending the transaction between the defendant and Haycock. The question respecting the application of the statute, in an action by a creditor to recover upon a contract between his debtor and a stranger, to pay the debt, also arose and was decided the same way, in the more recent cases of *Maxwell v. Haynes*, 41 Maine, 559, A. D. 1856, and *Perkins v. Hitchcock*, 49 Maine, 468, decided A. D. 1860, but they present no features requiring special comment. In the following cases no question arose except as to the right of the person to be benefited by the contract to enforce it at common law. His right was affirmed in *Hinkley v. Fowler*, 15 Maine, 285; *Warren Academy v. Starrett*, id., 443; and *Motley v. Manuf. Ins. Co.*, 29 Maine, 337. And conversely it was held in *Tewksbury v. Hayes*, 41 Maine, 123, that the plaintiff could not maintain an action upon a contract in writing, reciting that in consideration of a conveyance by him to the defendant of the plaintiff's interest in a mill, the defendant agreed to pay to Cornelia E. Blake the amount of her interest in the mill; because the contract contained no promise to the plaintiff. The general common law rule, deducible from the cases above mentioned and those cited in the text, was reaffirmed in *Bohanan v. Pope*, 42 Maine, 93, A. D. 1856; where it was also held, that if the person to be benefited by a contract between two others, is also a debtor of the party from whom the consideration flows, and if he should “disregard it and seek his remedy directly against the party with whom his contract primarily exists,” then “such party may recover against the party contracting with him, in the same manner, as if the stipulation in the contract had been made directly with him, and not for the benefit of a third person,” and that an election of one remedy implies the abandonment of the other. And it appearing that the plaintiff had been hired by one Whitney to do certain work; that the defendants had previously made a contract with Whitney, whereby they agreed to pay his men; that this contract was shown to the plaintiff when he was hired; and that after the plaintiff had done the work, Whitney gave him an order on the defendants, which they refused to pay; whereupon the plaintiff sued and recovered judgment against Whitney; it was held that he could not maintain an action against the defendants.

remove all doubt as to the application of the statute, and the true rule at common law, but will also completely turn the current of the decisions upon various questions which are now the subject of much debate. We refer to the case of *Warren v. Batchelder*, 16 New Hampshire, 580, decided in 1845, but not published till 1863. The action was for money had and received. The defendant had been a debtor to one Dow upon a promissory note; and the plaintiff had commenced a suit against Dow, in which he had summoned the defendant by a trustee process as Dow's debtor. Pending the suit Dow called on the defendant for payment of his debt; but the defendant objected to paying, on account of the trustee process. Thereupon Dow and the defendant agreed that the latter should pay the former the amount of the debt, less a sum equal to the plaintiff's demand against Dow and the costs, which sum the defendant should pay to the plaintiff; and the balance was paid to Dow, who surrendered the defendant's note. The plaintiff proceeded with his suit against Dow, and finally recovered a judgment therein; but before judgment the trustee was discharged. Nearly four years afterwards, the plaintiff demanded from the defendant payment of the money left in his hands by Dow, and upon his refusal commenced this action.

§ 401. The cause was first heard in 1844, and the decision thereon is reported in 15 New Hampshire, 129. Upon that occasion, a verdict for the plaintiff was set aside on exceptions; an opinion having been delivered by Gilchrist, J., concluding, after an examination of the authorities, that the plaintiff could not recover because he was a stranger to the consideration. This decision was generally supposed to have settled the rule in that state, until the publication of the 16th New Hampshire, nineteen years afterwards. From the latter report it appears, that upon a new trial of the cause, the plaintiff had a verdict, subject to the opinion of the court; there being no material difference between the evidence upon the two trials, except that the report of the first trial states that the plaintiff issued

an execution upon his judgment. But upon the second verdict the court rendered judgment for the plaintiff. Upon the latter occasion, an elaborate opinion was delivered by Woods, J., wherein he insisted that when a contract has been made between a debtor and a stranger, providing for the payment of the debt by the latter, the creditor may make himself a party to it, and entitle himself to recover upon it, by a subsequent ratification; that such a ratification is accomplished by a demand of fulfilment, made upon the person who had undertaken to pay the debt, and the commencement of an action against him, in case of his refusal; and that such a demand, followed by the commencement of an action, amounts in law to an extinguishment of the original debt. (b) An extended com-

(b) The learned judge commenced by assenting to the broad proposition, that the person to be benefited might maintain the action; and after examining anew the authorities, he said, that the plaintiff, in order to recover, must be a party to the arrangement between Dow and the defendant, either by an original participation in it, or by a subsequent assent to it, and adoption of its provisions. That it was well settled, that unless the demand of the plaintiff against Dow was to be considered as cancelled by the arrangement, his assent to it was not so perfect and unqualified as to entitle him to the benefit which it was intended to provide for him. But that such an assent, and an acceptance of the provision so made for him, whether cotemporaneous with, or subsequent to, the acts of the other parties, must operate to discharge the debt, unless there should be cause for holding that the provision was merely collateral; and no such cause existed in the present case. And it was stated to be the unanimous opinion of the court, that in such cases of a deposit by a debtor with a third person for the payment of his debt, upon the promise of the depository to pay the same to the creditor, together with the assent of the creditor to the arrangement, and his acceptance of the provision thus made for him, his original demand must be deemed to be discharged, and a new debt and a new debtor substituted. The next question was, whether the evidence showed such an assent, so that a privity between the parties became established. Upon this point the learned judge said, that something more than the commencement of a suit was necessary to indicate the assent, and something anterior to that measure was needful to establish the necessary privity. A mere demand, he thought, was insufficient for the purpose; "but," he concluded, "a demand and refusal, followed by a suit, or any other equally plain demonstration of a purpose to adopt and to insist upon the new provision, is such evidence of an election of it, in preference to the

ment upon this opinion would be out of place here. It suffices to say that its doctrines are so novel, not to say revolutionary, that it cannot be regarded as a precedent elsewhere, until they shall have received the sanction of other adjudications.

§ 402. It would seem that the courts of VERMONT sustain the creditor's remedy, at common law and under the statute, according to the case of *Wait v. Wait's Executor*, 28 Vermont, 350, decided in 1856; although the distinction between a promise to the debtor and one to the creditor does not appear to have been clearly taken. There the plaintiff appealed from the decision of the probate court, disallowing a claim in his favor, against the estate of Joseph H. Wait, and the auditor reported the following facts: The plaintiff had erected a barn upon premises then owned by one Joseph Wait, under his assurance that the premises should be conveyed to the plaintiff, or, if they were conveyed to another, that the grantee should pay the plaintiff for erecting the barn. Afterwards the premises were conveyed by Joseph Wait to Joseph H. Wait, the deceased; and the latter, soon after the conveyance was made, informed the plaintiff that he was to pay him for building the barn and that he would do so as soon as he could; and on several other occasions he recognized the debt and promised to pay it. The defence was that "this promise to pay the plaintiff his claim"

original debt, as to conclude the party, and to bar him from the pursuit of a collateral remedy, against the terms and intentions of the parties who have furnished the new. A direct and explicit assent, in terms, to accept the provision as payment, would clearly, upon the authority of *Heaton v. Angier*, (see ante, § 332,) discharge the antecedent debt. Whether the assent be contemporaneous or not, seems immaterial. If the assent appear, not by the clear and unambiguous language of the party creditor, but by his unambiguous act, it is equally availing as an election between two remedies, of which he is entitled to only one. The bringing of an action, following a demand, is an act that may well be regarded as an election of remedies, and should be attended by the proper consequences of an election in excluding the party from the alternate and collateral remedy."

was void by the statute of frauds. But the court held that the fair construction of the auditor's report was, that payment of the debt to the plaintiff, was part of the consideration of the conveyance to the deceased; and, as matter of law, that where property had been placed in the hands of the promisor by the debtor for the purpose of paying a debt, the promise was out of the statute. The decision of the probate court was therefore reversed.

§ 403. In the opinion of the Supreme Court in this case, it was said that the rule that a promise to pay the debt is collateral, as long as the original liability continues, has no application "to cases where the original debtor places property of any kind in the hands of a third person, and that person promises to pay the claim of a particular creditor. The promise in such case is an original promise, and the property placed in his hands is its consideration." This remark seems to indicate that the court had in mind a tripartite agreement, of which there was no evidence; and in *Fullam v. Adams*, 37 Vermont, 391, (c) the case of *Wait v. Wait* was cited, as holding that the promise to the plaintiff was not within the statute; and as showing that where the promisor holds a fund of the debtor for the purpose of paying the debt, so that as between him and the debtor he is primarily liable for it, his promise to the creditor is not within the statute, because it is substantially to pay his own debt.

§ 404. In the State of New York the right of the person for whose benefit a contract was made, to sue for its breach, and, where he is a creditor of the promisee, to maintain the action without reference to the statute of frauds, has, after considerable conflict of authority, been conclusively settled by a number of modern decisions; which generally take the correct distinction between the original promise to the debtor, and a subsequent promise to the creditor. In the earliest, *Gold and Sill v. Phillips*, 10 Johnson,

(c) Cited at length in chapter xvii.

412, decided A. D. 1813, in the Supreme Court, the action was really founded upon a promise to the debtor, but there was a subsequent promise to the creditor, upon which the declaration counted; and the case furnishes an instance of that confusion between the two promises, referred to in the first article of this chapter. (d) The report says that the action was brought by the plaintiffs "to recover their fees as attorneys and counsellors." The proof was that one Wood had conveyed a farm to the defendants, for a specified consideration; which was secured to be paid by a bond of the defendants, and a mortgage on the premises. By the terms of the bond, part of the consideration was to be paid in money to Wood; and the remainder was made up of debts due by Wood, mentioned in the bond, which the defendants assumed to pay, and to indemnify Wood against the same; among others the debt due to the plaintiffs. Subsequently the defendants conveyed the farm to another person, who agreed with them to pay the debts of Wood which they had assumed; and thereupon the defendants' bond was cancelled. On the day when the conveyance from Wood to the defendants was made, they wrote a letter to the plaintiffs, saying that by an arrangement between them and Wood, they were accountable to the plaintiffs for the balance due them by Wood. The letter was not however sufficient, as a memorandum of the agreement, to satisfy the statute. The plaintiffs having sued to recover from the defendants the debt due to them by Wood, a verdict was taken for them, subject to the opinion of the court.

§ 405. The court said that the promise of the defendants was not within the statute of frauds, because it "was founded on a new and distinct consideration." That "the defendants made the promise, in consideration of a sale of lands made to them by Wood; and they assumed to pay the debt of the plaintiffs, as being, by arrangement with Wood, part payment of the purchase money. Here was a

(d) Section 392.

valid assumption of the debt of Wood." Judgment was accordingly rendered on the verdict for the plaintiffs. But there was another suit against the same defendants, in favor of Gold alone, to recover fees due from Wood as solicitor in chancery ; and the case shows that there was evidence, from which the jury could have inferred, that Gold's debt was also included in the bond. But the Court directed judgment for the defendants in that suit ; on the ground that an inquiry as to the extent of the promise, showed that "it was made jointly to Gold and Sill." This clearly refers to the letter ; so that the case is an authority against the doctrine that an action will lie upon a promise to the debtor, unless it proceeded upon the ground that the promise was contained in a sealed instrument.

§ 406. This case was followed by several others involving the application of the statute, where the creditor, the debtor, and the new promisor were all parties to an agreement, whereby the latter undertook with the creditor to pay him the debt, in consideration of a fund placed in his hands by the debtor ;(e) and the first case where the Supreme Court had occasion to determine the effect of a promise to the debtor, contained in a contract to which the creditor was not a party, was *Barker v. Bucklin*, 2 Denio, 45, A. D. 1846. There the action was to recover money due to the plaintiff from Francis B. Bucklin ; and the report states that the declaration averred "that the defendant, in consideration of a pair of horses delivered to him by Francis, and of forbearance by the plaintiff to prosecute Francis for the debt, at the defendant's request, had promised the plaintiff to pay him the value of the horses towards the debt which Francis owed the plaintiff." On the trial the plaintiff proved an indebtedness of Francis to the amount of \$372.17, and that the demand had been placed in the hands of an attorney for

(e) *Olmstead v. Greenly*, 18 Johnson, 12 ; *Farley v. Cleveland*, 4 Cowen, 432, and 9 Cowen, 639 ; *Jennings v. Webster*, 7 Cowen, 256 ; *Ellwood v. Monk*, 3 Wendell, 235 ; in chapter xv, article iii.

collection; that Francis, being pressed for payment, delivered to the defendant a pair of horses, upon his agreement to pay upon the demand of the plaintiff the sum of \$160, which was agreed upon as their value; and that the defendant thereupon wrote to the attorney a letter containing this expression: "I have taken my brother's team, and will be accountable to you for the same, if you will be so good as not to trouble him." This letter was sent by the defendant to the attorney by the hands of Francis, who informed him of the arrangement; and he thereupon agreed to give Francis time, and did so; but this was not communicated to the defendant.

§ 407. The defendant moved for a nonsuit, on the ground, among others, that the letter contained only a proposition, which was not binding until it was accepted, and the judge directed a nonsuit accordingly. The plaintiff moved for a new trial. The opinion of the court, delivered by Jewett, J., first considered the question whether the plaintiff, under a proper count, could sustain an action to enforce the defendant's promise to pay the price of the horses, which he purchased. The authorities were cited and commented upon at length, and the learned judge came to the conclusion, that the weight of authority was in favor of the proposition, that the person to be benefited by a promise to another could sustain an action upon it, although he was a stranger to the consideration. The opinion then examined the question whether the statute of frauds would prevent a recovery; upon which point the learned judge concluded, that the doctrine that a new and independent consideration would take out of the statute, a promise to the creditor to pay another's debt, was unsound. That principle he thought was applicable only to promises made to the debtor; those were not within the statute; and in the case at bar, the defendant's promise was obligatory upon him, it being merely to pay his own debt to a particular person, designated by his own creditor. But because the plaintiff had counted in his declaration upon a promise made to himself, and not

upon one made to Francis for his benefit, the motion to set aside the nonsuit was denied ; the learned judge remarking : "The contract set out in each of the special counts is widely variant from the one proved."

§ 408. Of the next case, *Blunt v. Boyd*, 3 Barbour, 209, A. D. 1848, also in the Supreme Court, it will be sufficient to say that the defendant was a debtor to one Rowley ; that he and Rowley settled their accounts, and deducted from the sum found to be due from him to Rowley, the amount of a debt due from Rowley to the plaintiff, the defendant promising to pay that amount to the plaintiff, and giving Rowley his note for the balance ; and that when an agent of the plaintiff subsequently called upon the defendant, in relation to the payment of the plaintiff's demand "for lumber sold to Mr. Rowley," the defendant said that he would settle it, if the plaintiff would deduct \$9, for unfinished work of Rowley. It was held by a majority of the court, that as the defendant's promise to the plaintiff's agent related to the plaintiff's demand against Rowley, it was clearly within the statute of frauds ; and that the plaintiff could not recover upon the contract between Rowley and the defendant, for want of privity as well as for want of consideration. The court regarded the promise as being without consideration, because the transaction did not amount to a discharge of the defendant's debt to Rowley ; and thought that where the objection for want of privity had been overruled in this class of cases, the defendant had actually received money or property as the consideration of his promise.

§ 409. The case of *Earle v. Crane*, 6 Duer, 564, decided in the New York Superior Court in 1857, fully affirms the principle of *Barker v. Bucklin*, and involves also the question whether the original parties could modify the agreement without the participation of the beneficiary. There the plaintiff's complaint stated that on the first of September, 1852, he was a creditor of Nathan Meyer, and that Meyer on that day agreed with the defendants to sell

them his stock of goods, at prices thereafter to be agreed upon, which they were to pay as follows: by paying the plaintiff \$581.63 of his debt; by deducting \$1,263.67 in discharge of a debt due to the defendants by Meyer, and by accounting for the remainder to Meyer; that on the 9th of October, 1852, the goods were delivered in pursuance of this contract, at prices agreed upon, amounting to \$2,800, leaving a balance of \$1,000 due to Meyer; and that Meyer's claim for that balance had been assigned to the plaintiff. The complaint asked for a judgment for the amount of the two sums of \$581.63 and \$1,000, with interest. On the trial it appeared that on the 9th of October, 1862, Meyer executed an absolute bill of sale of the goods to the defendants, purporting to be in discharge of his indebtedness to them. The plaintiff's counsel asked the witnesses several questions, tending to prove a previous oral agreement, in the terms set forth in the complaint, and a delivery of the goods by Meyer and an acceptance thereof by the defendants, under such an agreement. Those questions were excluded, and the complaint was dismissed.

§ 410. Upon exceptions to the rulings, a new trial was granted, Bosworth, J., who delivered the opinion of the court, remarking, "Proof of such an agreement, as is stated in the complaint, and of full execution of it on the part of Meyer, standing alone, would entitle the plaintiff to recover the \$581.63. The plaintiff could sue on such a promise in his own name, although not a party to the agreement by being present and participating in the making of it; and such an agreement is not affected by the statute of frauds." The learned judge then proceeded to say that if such an agreement was made, it might be modified, before delivery and acceptance of the goods, by the act of Meyer and the defendants, without the participation of the plaintiff; and in that case the plaintiff could not recover; but if the goods were actually delivered by Meyer, and accepted by the defendants, upon the terms stated in the complaint, the subsequent execution of an absolute bill of sale, could not affect the plaintiff's right to recover

the amount to be paid to him, by the terms of the original agreement. .

§ 411. The case of *The State Bank at New Brunswick v. Mettler*, 2 Bosworth, 392, decided in 1858, in the same court, is one of those in which, it is believed, the test of the application of the statute is made to depend upon too narrow a rule. (f) Stripped of much extraneous matter, the facts were that the defendants had promised the drawer of a bill of exchange upon them, which had been discounted by the plaintiffs but had been protested for non-acceptance, and was not yet payable, that they would pay it to the plaintiffs; in consideration that the drawer would permit certain grain, then-in transitu, to go forward to them for sale on commission; assign to them his canal barges and other personal property; and confess a judgment so as to bind his real estate. It had been the usual course of business, between the drawer and the defendants, that he should consign grain to them, and draw upon them against the proceeds; and it is to be inferred from some of the remarks of the court, that the object of the transaction was to secure the defendants for advances or acceptances previously made, as well as to provide for payment of the plaintiff's bill. A judgment for the defendants rendered upon a referee's report was affirmed on appeal. The opinion of the court (Bosworth, J.,) turns upon the following extract: "To take the case out of the statute of frauds, the verbal promise of a third person, made to a debtor of the plaintiffs, to pay to the latter a debt which the promisee owes them, must find its consideration in a purchase of property from the promisee; so that the amount which is promised to be paid, is to be paid in discharge of the proper debt of the promisor: or the transaction and promise must be such, that making the promised payment to the plaintiffs, as creditors of the promisee, will operate, incidentally, as a satisfaction of the debt of the latter, and, primarily, as payment of the debt of the

(f) See ante, § 393.

promisor." . . . : "When the promise places the promisor in the position of a surety for the debt of his promisee, the case falls clearly within the statute, and the agreement is void."

§ 412. In 1859, the Court of Appeals had occasion definitely to settle the rule in New York, with respect to the common law right of the beneficiary to maintain an action upon a contract between others; and incidentally with respect to the application of the statute. In *Lawrence v. Fox*, 20 New York, 268, it appeared that one Holly loaned to the defendant the sum of \$300, on his promise to pay it the next day to the plaintiff, in discharge of a debt due him by Holly, of the same amount, which was then payable. The plaintiff recovered in the court below, notwithstanding the defendant's objections, that the agreement with Holly was void for want of consideration, and that there was no privity between the plaintiff and the defendant. Upon appeal this judgment was affirmed by a vote of six judges against two. The leading opinion was delivered by Gray, J., who placed his decision chiefly upon the ground, that in consequence of the defendant's duty to pay the debt, the law implied a promise to that effect from the defendant to the plaintiff; but some of the majority thought that Holly was to be regarded as the agent of the defendant. A brief abstract of this opinion will be found in the note, which also contains a reference to numerous other cases in the same state, upon this most perplexing question.(g)

(g) After disposing of an objection to the testimony, and of the question of consideration, the learned judge proceeded to consider the objection of want of privity, citing and commenting at length upon the cases in England, New York, and Massachusetts. In the course of this part of the opinion, he referred to *Seaman v. Whitney*, 24 Wendell, 260, as containing an intimation from the court, notwithstanding that the plaintiff was not allowed to recover upon the peculiar facts of the case, that an undertaking to pay the creditor may be implied, from an arrangement to that effect between the defendant and the debtor; and to *The Delaware and Hudson Canal Company v. Westchester County Bank*, 4 Denio, 97; and a remark of the court

§ 413. In MARYLAND, the earlier cases were somewhat inconclusive; (h) but the rule is now established with

in *Brewer v. Dyer*, 7 Cushing, 337, (see note to § 420,) as sustaining the same doctrine of an implied promise. But, he continued, it was urged, on the part of the defendant, that because the defendant was not in any sense, a trustee of Holly's property for the benefit of the plaintiff, the law will not imply a promise. This argument the learned judge answered by saying, that in the cases where there was such a trust, the duty of the trustee to pay according to the terms of the trust, implies a promise to do so; and that in this case the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; this made it his duty to do so, and as well implied a promise to that effect, as if he had been made a trustee of property to be converted into cash with which to pay. The principle that the person for whose benefit a contract was made, may sue for its breach, "has been," he continued, "applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such, applicable to those cases." He then said that Holly could not discharge the promise, because it was made for the plaintiff's benefit, and in accordance with legal presumption, accepted by him, until his dissent was shown. The cases, he concluded, establish the validity of a parol promise. Three of the judges concurred fully in this opinion, and two concurred in the result, on the ground "that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify, when it came to his knowledge, though taken without his being privy thereto." The two remaining judges dissented from the result; Comstock, J., delivering an elaborate opinion in support of the proposition, that the plaintiff could not maintain the action, because there was no privity of contract between him and the defendant. This case has been cited with approbation, and the general principles established by the decision have been followed in *Burr v. Beers*, 24 New York, 178 (A. D. 1861), where the Court of Appeals affirmed a judgment in a personal action in favor of a mortgagee, against a grantee of the mortgaged premises, whose deed contained a recital that he had assumed to pay the mortgage; in *Becker v. Torrance*, 31 New York, 631 (A. D. 1864), where it was held, that a plaintiff in an execution might maintain an action against a receiver of the judgment debtor's property, whose title to the goods of the debtor was subordinate to the lien of the execution, upon his verbal promise to the officer to sell the goods, and apply the proceeds to the discharge of the execution; and in *Dingeldein v. The Third Avenue Railroad Company*, 37 New York, 575 (A. D. 1868), where a plaintiff was allowed to recover against the assignee of personal property named in an instrument, which specified that it was taken, subject to the payment of all money, which the assignors were bound to pay, on

(A) See *Owings v. Owings*, 1 Harris and Gill, 484 (A. D. 1827).

respect to the common law question, and probably also that arising under the statute of frauds, by the recent case of *Small v. Schaefer*, 24 Maryland, 143 (A. D. 1865). The facts of this case, as far as they are material to the

account of claims of a certain description, the plaintiffs' being one of that description. But in *Kelly v. Roberts*, 40 New York, 432 (June, 1869), an important distinction was taken. This was an action in favor of a sheriff, to recover the amount due by the defendant to Everett and Jones, against whom the plaintiff held an attachment, the action being brought in pursuance of a provision of the New York code of procedure, authorizing a sheriff holding an attachment to collect debts due to the defendant therein. It appeared upon the trial, that by a written agreement, under seal, between the defendant in this action and Everett and Jones, the latter transferred to the former a quantity of goods, and the former agreed to pay the latter therefor thirty per centum of the actual cost; an inventory to be forthwith taken specifying the cost of each article, and to be annexed to the agreement when completed. It was also verbally agreed between them, (but the testimony did not show whether this verbal agreement was made at the same time with the contract; or afterwards, when the inventory was made), that part of the consideration money was to be paid, by the defendant paying to certain persons designated, two notes particularly described, thereafter to mature, which were made by Everett and Jones, and held by the persons so named; but neither the defendant nor Everett and Jones had communicated this provision to such persons, nor did it appear that the latter had in any manner assented thereto. The attachment was issued and served about the time when the first note matured, but before it was paid. The plaintiff had a judgment, which the Court of Appeals affirmed. James, J., delivering the prevailing opinion, took the distinction between this case, and *Lawrence v. Fox* and kindred cases, that here the transaction was consummated, before any direction was given to pay the notes, so that the defendant had become a debtor of Everett and Jones; the agreement to pay the notes was therefore made without any new consideration; and never having been communicated to the holders of the notes, or assented to by them, it was revocable at the pleasure of Everett and Jones, until it was acted upon by the defendant. He added, that apparently the verbal agreement was made after the written assignment and covenant by the defendants to pay Everett and Jones; but that the precise time was immaterial; because, if it was made before, or at the same time when the covenant was entered into, it would be merged in the latter; and supposing it to have been made afterwards, there was no delivery of money or property to the defendant for the benefit of another, or the creation of any trust or agency for another: it was simply an executory contract without consideration; in effect, a license; so that as matter of law, the debt was still due to Everett and Jones, and liable to the

present discussion, were that one McGinn, a broker, being in default to the plaintiff and to the defendant, (two of his customers), the defendant in consideration of his giving him an order on a bank for five state bonds, payable to

attachment. In the result of this opinion, four of the other judges concurred; one of them, however, putting his decision upon the ground, that the fair inference was, that the verbal agreement was made at the same time with the covenant, and was therefore merged into it; and two of the judges were for reversal. The cases of *Therasson v. McSpedon*, 2 Hilton, 1, in the New York Common Pleas, A. D. 1858; *Seaman v. Hasbrouck*, 35 Barbour, 151, A. D. 1861, in the Supreme Court; and *Huber v. Ely*, 45 Barbour, 169, in the same court, A. D. 1865, also hold, that a promise to pay a debt, made to a debtor, upon a consideration proceeding from him, is not within the statute of frauds, and may be enforced by an action in favor of the creditor. In each of them, the consideration of the promise was the purchase of property from the debtor; and the promise to him is stated to constitute the foundation of the creditor's action. In *Huber v. Ely*, the reason assigned for the decision upon the application of the statute, was that "it is the promise of one deriving a benefit by means of the undertaking, and having funds placed in his hands for the payment of the indebtedness, which he promises, in consideration thereof, to discharge;" in the others, the decision was put upon the ground, that the promise was only to pay the promisor's own debt in a particular way. However, in *Seaman v. Hasbrouck*, the court added that the purchase money was a fund for the benefit of the creditors; and that the promise might be regarded as made to them through the debtor as their agent. But in *Connor v. Williams*, 2 Robertson, 46, decided in the New York Superior Court, A. D. 1864, Robertson, C. J., showed very clearly that the doctrine of an agency in the debtor for the creditor, brings the case directly within the statute of frauds; and he thought that the action could be consistently sustained only on the idea of a general duty to pay the debt, upon which the law implied a promise. Before the decision in *Lawrence v. Fox*, the rule in New York was rendered uncertain by contradictory decisions. See besides the cases cited in the text, *Schemerhorn v. Vanderheyden*, 1 Johnson, 139; *Cumberland v. Codrington*, 3 Johnson's Chancery, 229, on p. 254, per Kent, Chancellor; *Shear v. Mallory*, 13 Johnson, 496; *Safford v. Stevens*, 2 Wendell, 158; *Sailly v. Cleveland*, 10 Wendell, 156; *Seaman v. Whitney*, 24 Wendell, 260; *Berly v. Taylor*, 5 Hill, 577; *Delaware and Hudson Canal Company v. Westchester County Bank*, 4 Denio, 97; *Bigelow v. Davis*, 16 Barbour, 561. In the case in the 4th of Denio, which is mainly relied upon as sustaining the doctrine of an implied promise, there was a special demurrer to a declaration in assumpsit, alleging that certain debtors of the plaintiffs, placed a bill of exchange in the defendants hands, who undertook to collect it, and to pay the amount to the plaintiffs

bearer, (three of which had been purchased with the defendant's money, and on his order), there deposited as security for any overdraft of McGinn, verbally agreed with him, that he would pay the amount of an overdraft already paid and charged against McGinn by the bank, and also McGinn's dishonored check held by the plaintiff. Three points were made by the defence, namely, that there was no privity of contract, that there was no consideration for the contract, and that the contract was void by the statute of frauds. The Court of Appeals affirmed a judgment for the plaintiff. With respect to the first point it was held, upon a review of the cases on either side, that the prevailing doctrine in this country was, that the person to be benefited by a promise could maintain an action upon it, and that it was to be deemed to be made to him if adopted by him. The objection that the promise was void under the statute of frauds was overruled, on the ground that the leading object of the promisor was to benefit himself. But it was clearly sufficient to say that the promise was made to the debtor.

§ 414. In INDIANA the ruling in the New York cases is supposed to have been followed in *Decker v. Shaffer*, 3 Indiana, 187, A. D. 1851. The action was commenced in a justice's court against the defendant as administrator of

when collected; and that it had been collected, but that the defendants, upon special request, had refused to pay the money. It was specified as a cause of demurrer, that the declaration did not aver any promise to the plaintiffs. The court overruled the demurrer, Jewett, J., saying, that a contract might be set out in pleading according to its words or its legal effect; and here "the ground of the action is a promise made to another for the benefit of the plaintiffs, and not on a promise to the plaintiffs;" consequently the declaration stated it according to the fact. It is to be inferred from the learned judge's remarks, that he regarded a declaration for money had and received as stating the transaction according to its legal effect. Bronson, J., said that if the question was new, his opinion would be, that the pleader should have stated the promise as having been made to the plaintiffs; but upon the authority of the report of *Dutton v. Poole*, T. Raymond, 202, he agreed that it was right to state it as having been made to the debtors.

one Shookman, "to recover a debt claimed to have been due from Shookman" to the plaintiff. It went to the Circuit Court by appeal; and the proof was that the plaintiff sold a mare to one Cuppy, and took his note for the purchase money; and that Shookman afterwards bought the mare from Cuppy, on a promise to pay to the plaintiff the note held by him. In the Circuit Court the plaintiff recovered, and the judgment was reversed on error to the Supreme Court. Some of the remarks in the opinion, if read without reference to the rest of the case, would lead to the inference that the court intended to hold, that the promise of Shookman to Cuppy was within the statute of frauds. But probably the decision turned upon the fact, that the plaintiff declared upon a promise from Shookman to himself; and the key note to the decision is to be found in these remarks, at the beginning of the opinion: "The judgment cannot be upheld. The plaintiff below did not make out his case. He proved no indebtedness from Shookman to him." (i)

§ 415. In ILLINOIS the same rule prevails. Of the cases where the application of the statute came in question, it was held in *Eddy v. Roberts*, 17 Illinois, 505, A. D. 1856, that upon the merits, the plaintiffs would be entitled to recover upon the evidence, which proved a verbal promise of the defendant, made to one Williams, in consideration of a sale of property by him, to pay a debt due by Williams to the plaintiffs. But because the plaintiffs had

(i) It seems to have been once held in Indiana, that a stranger to the consideration could not sue for breach of a contract. *Farlow v. Kemp*, 7 Blackford, 544 (1845); *Bird v. Lanius*, 7 Indiana, 615 (1856). But later cases hold that the person to be benefited may maintain the action. *Day v. Patterson*, 18 Indiana, 114 (1862); *Lamb v. Donovan*, 19 Indiana, 40 (1862); *Raymond v. Pritchard*, 24 Indiana, 318 (1865). One case assigns the merger of the systems of law and equity as the reason why the course of the decisions was changed, an equitable rule having suspended the legal. *Beals v. Beals*, 20 Indiana, 163 (1863). The ruling in the New York case of *Barker v. Bucklin*, is also approved in *Nelson v. Hardy*, 7 Indiana, 364, A. D. 1856, cited in a subsequent chapter.

declared, not upon the defendant's promise to Williams, but upon a similar promise subsequently made to them, upon a new consideration moving from them, which the court held to be within the statute; a judgment for the plaintiffs was reversed, with leave to amend the declaration. It was however suggested by the court, that the plaintiffs should allege in declaring that the special contract was made to them; but, as we have already shown, this is not only contrary to the ruling in New York, but inconsistent with the principles, upon which, according to the modern cases, the action depends.(j)

§ 416. In ALABAMA the earlier decisions were to the effect, that the person for whose benefit a contract was made could not maintain the action at common law, although, where he was a creditor of the other party, the promise to his debtor was not within the statute; but that a new promise to the creditor, by the person who had agreed to pay the debt, would remove all objections to the recovery, and the action must be founded upon that promise.(k) But in *Mason v. Hall*, 30 Alabama, 599, A. D. 1857, the rule was laid down in substantial harmony with *Barker v. Bucklin*, and kindred cases. The complaint was for the hire of a negro man; and the proof was that the plaintiff had hired the negro to the defendant's son for one year, at a specified price; and that very soon afterwards, the son hired the negro to the defendant, upon an agreement that he would pay to the plaintiff the price agreed upon, deducting five dollars, which the son agreed to pay. The plaintiff was nonsuited, and on a motion to set aside the nonsuit, the court held that the promise was

(j) In *Prather v. Vineyard*, 4 Gilman, 40 (1847), and *Brown v. Strait*, 19 Illinois, 88 (1857), the general principle with respect to the application of the statute is affirmed, in harmony with *Eddy v. Roberts*; and the common law rule is laid down the same way in *Bristow v. Lane*, 21 Illinois, 194 (1859).

(k) *Hitchcock v. Lukens*, 8 Porter, 333 (A. D. 1838); *McKenzie v. Jackson*, 4 Alabama, 230 (A. D. 1842); *Lee v. Fontaine*, 10 Alabama, 755 (A. D. 1846).

not within the statute of frauds; that where a parol promise is made to one for the benefit of another, the latter may maintain an action upon it, although the promisee might also sue; but that in this case there was a fatal variance between the complaint and the proof, because the complaint relied upon a hiring by the plaintiff to the defendant, instead of the defendant's promise to his son. (Z)

§ 417. The foregoing abstracts of cases present a great diversity of opinion, touching the principles, upon which the statute of frauds is considered inapplicable, and the action is sustained at common law; as well as the questions incidentally arising out of the common law rule. (m) It remains only to notice the peculiar ruling of the courts of MISSOURI. It was said in *Robbins v. Ayres*, 10 Missouri, 538, A. D. 1847 that upon a simple contract between two persons, that one will pay a debt due by the other, the creditor can maintain an action, and the case is not within the statute of frauds. But in that case the plaintiff was not allowed to recover; partly because the contract between his debtor and the defendant was under seal; and partly because it provided for the payment

(i) And see *Cameron v. Clarke*, 11 Alabama, 259, A. D. 1847. The common law rule had been previously laid down, substantially in accordance with the decision in *Mason v. Hall*. See *Huckabee v. May*, 14 Alabama, 263; *Hoyt v. Murphy*, 18 Alabama, 316.

(m) The following additional cases are in general accord with those previously cited, upon the common law question, or that arising under the statute of frauds. NEW JERSEY, *Berry v. Doremus*, 1 Vroom, 399 (A. D. 1863). KENTUCKY, *Smith v. Lewis*, 3 B. Monroe, 229 (1842); *Allen v. Thomas*, 3 Metcalf, 198 (1860). SOUTH CAROLINA, *Brown v. O'Brien*, 1 Richardson, 268 (1845); *Mann v. Mann*, 2 Richardson, 123 (1845); *Thompson v. Gordon*, 3 Strobhart, 196 (1848). WISCONSIN, *Kimball v. Noyes*, 17 Wisconsin, 695 (1864). MINNESOTA, *Sanders v. Clason*, 13 Minnesota, 379 (1848). NEVADA, *Alcalda v. Morales*, 3 Nevada, 132 (1867). GEORGIA, *Ford v. Finney*, 35 Georgia, 258 (1866). TEXAS, *Wallace v. Freeman*, 25 Texas, Supplement, 91 (1860). The common law rule seems to have been laid down in the same way in CALIFORNIA, *Kreutz v. Livingston*, 15 California, 344 (1860); and in DELAWARE, *Farmers' Bank v. Brown*, 1 Harrington, 330 (1834.)

of the sum of \$600 to the plaintiff and sundry other creditors of the other party, without mentioning the amount of the debt due to each respectively, or even the number or names of the beneficiaries ; but describing them as the hands employed upon a certain boat, the sale of which formed the consideration of the promise. After the contract was executed, but before the boat was taken away, "the instrument was read to the hands, and they accepted its terms." But the court said that the covenant merged all simple contracts, "and a simple promise to pay that sum afterwards would be inoperative." But in subsequent cases, the courts of Missouri have apparently adopted a rule which practically denies the existence of any common law right on the part of the creditor, to maintain an action upon a contract to pay the debt, made between the debtor and a stranger. It would seem to follow, as the result of the most recent decisions in that state, that where the consideration proceeded from the debtor and the promise was made to him, it will be regarded as having been made exclusively for his benefit and protection, and as a matter with which the creditor has no concern. The ruling upon the application of the statute of frauds is consequently of no importance, as respects this kind of action.(n)

(n) There was a dictum in *Bank of Missouri v. Benoist*, 10 Missouri, 519, A. D. 1847, to the effect that the common law permitted a person to enforce a contract between others, made for his benefit ; but it was not necessary to the decision. But in *Manny v. Frasier*, 27 Missouri, 419, A. D. 1858, the defendant's intestate had purchased the interest of one Bell in the firm of Bell and Sticknell, and on coming into the firm had agreed with them to pay certain debts of the firm ; among others, notes held by the plaintiffs. A judgment for the plaintiffs was reversed upon appeal ; the court saying that the case did not fall within the common law rule recognized in *Robbins v. Ayres*, and *Bank of Missouri v. Benoist*, and that there was no privity of contract between the plaintiffs and the intestate. The recognized rule was illustrated by a promise of A to pay B for the benefit of C. And the principle is more fully explained in *Page v. Becker*, 31 Missouri, 466 (A. D. 1862). There it was held that neither a mortgagee nor his assignee could recover, upon a promise of the defendant to the mortgagor, to pay the amount of a mortgage given to secure certain notes for the purchase money

ARTICLE III.

American cases holding that the statute applies to the action.

§ 418. The State of MASSACHUSETTS is generally regarded as one of those, whose courts hold that the statute of frauds applies, where a creditor sues upon a promise made to his debtor, whereby the promisor undertakes to pay the debt; and such appears to be the leaning of the courts in that State, although a careful examination of the adjudicated cases will show that the question is not yet conclusively settled. The case from which the contrary impression is derived is *Curtis v. Brown*, 59 Massachusetts (5 Cushing), 488, decided A. D. 1850. The report says that, "the alleged cause of action was a verbal promise by the defendant to pay the plaintiff, the amount of a bill originally due him from one Augustus A. Coffin;" from which statement it appears that the plaintiff, as in *Barker v. Bucklin*,^(a) relied, not upon the contract between his debtor and the defendant, but upon a promise to himself. At the trial, it appeared that Coffin had entered into a contract with the defendants, to erect certain houses for them; and before the stipulated period, (as extended by a subsequent agreement,) had expired, a verbal agreement was made between him and the defendants; whereby he released them from the contract, and transferred to them the building materials on the premises, upon their verbally undertaking to pay all the outstanding bills for work upon the buildings; among others one

of the mortgaged premises; the equity of redemption having been conveyed to the defendant, upon his verbal agreement to pay the notes and the mortgage. It was said that the defendant's agreement "was exclusively for the benefit of his grantors, and was a matter entirely between the parties to that deed." The opinion concludes; "There is evidence that Becker recognized his liability to pay the notes, both before and after they had been assigned by Hampton to the plaintiff; but the plaintiff does not go upon the hypothesis of a promise by Becker to him directly. No such case is made by the petition; no express promise is averred therein; and if there had been, it would have been without consideration."

(a) See ante, § 406.

due to the plaintiff, which was particularly mentioned and assented to by the defendants. The defendants thereupon requested Coffin, to inform the plaintiff and the other creditors of the arrangement; to request them to make out their bills to the defendants; and to say to them that they (the defendants) would pay the bills; which was done by Coffin, and the plaintiff's bill made out accordingly. Coffin also made a verbal agreement with the plaintiff and the other creditors, "to look to the defendants for their pay;" and the defendants in fact paid several of the bills. The judge ruled at the trial that the defendants' promise was void by the statute of frauds, and the jury under his instructions, found a verdict for the defendants.

§ 419. A motion for a new trial upon exceptions was denied by the Supreme Court, Shaw, C. J., delivering the opinion. He assumed that under the circumstances of the case the promise of the defendants, communicated at their request to the plaintiff by Coffin, was equivalent to a direct promise to the plaintiff; and he then proceeded to examine the question whether the promise was within the statute of frauds, evidently referring, throughout the whole of the opinion, to the promise made through Coffin to the plaintiff directly. He refuted the idea that the relinquishment of a lien, benefit, or advantage possessed by the plaintiff, would take out of the statute a promise to pay the debt of another; unless the promisor acquired whatever was relinquished by the promisee. He added that the extinguishment of the original debt would also suffice to take the promise out of the statute. But here, he said, the plaintiff did not release Coffin, or relinquish any lien or benefit, and the consideration for the defendants' promise moved from Coffin. The exceptions were therefore overruled.

§ 420. The very recent case of *Furbish v. Goodnow*, 98 Massachusetts, 296, A. D. 2867, cited at length in another section, (b) is open to a similar criticism. The action

(b) See §§ 563, 564.

was upon an agreement, to which the plaintiff, his debtor, and the defendant were parties, the consideration having proceeded from the debtor; and the whole reasoning of the court is based upon the idea, that the contract upon which the action was brought was made with the plaintiff. It was said that the recent decisions in New York, Maine and Vermont had relaxed the application of the statute too far; and that, as the authorities were conflicting, it was the duty of the Massachusetts courts to follow the precedents in their own State. But in the Massachusetts cases, which were regarded as controlling, the plaintiff sued upon a promise to himself; and the court expressly distinguished *Alger v. Scoville*, 1 Gray, 391,(c) from the others, on the ground that there the promise was to pay a debt of the promisee, the consideration of which was a transfer of property from him to the promisor. The effect of the statute of frauds, upon an action brought by the creditor named in such a promise, does not therefore appear to have been conclusively determined in that State.(d)

(c) See ante, § 376.

(d) Before the case of *Mellen v. Whipple*, 67 Massachusetts (1 Gray), 317, A. D. 1851, it was supposed that the courts of Massachusetts had gone at least as far as those of New York, in affirming the common law right of the beneficiary to enforce a contract between others. The result of the cases was summed up in *Brewer v. Dyer*, 61 Massachusetts (7 Cushing), 337, A. D. 1851, where Bigelow, J., said that the principle had been "long established and clearly recognized" in that state "that where one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement," citing *Felton v. Dickinson*, 10 Massachusetts, 287; *Hall v. Marston*, 17 id., 575; *Arnold v. Lyman*, ib., 400, and *Carnegie v. Morrison*, 43 id. (2 Metcalf), 381. He added, "it does not rest on the ground of any actual or supposed relationship between the parties," "nor upon the reason that the defendant by entering into such an agreement has impliedly made himself the agent of the plaintiff;" "but on the broader and more satisfactory basis, that the law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation upon which the action is founded." But in *Mellen v. Whipple*, 67 Massachusetts, 317, the court held, on demurrer to a declaration setting forth the facts specially, that

§ 421. In CONNECTICUT it has been very distinctly ruled that the statute applies. In *Clapp and others v. Lawton and Wright*, 31 Connecticut, 95, A. D. 1862, the declaration contained sundry special counts, on a promise of the defendants to pay a debt due to the plaintiffs from Faulkner and Wright, and also a common count. On the trial it appeared that the plaintiffs were creditors of the firm of Faulkner & Wright, who sold out all their firm

the plaintiff, as the holder of a negotiable note secured by a mortgage upon real estate, and assignee of the mortgage, could not recover against the grantee of the mortgagor, who had conveyed the equity of redemption to the defendant, by a deed containing a stipulation that the defendant should assume and cancel the note and the mortgage. Metcalf, J., in delivering the opinion said that the general rule was that a stranger to the consideration could not sue upon a contract; and that the only exceptions to the rule, which had been recognized in Massachusetts, were where the promisee had either put money or property into the hands of the promisor as a fund to pay his debt; or was nearly related to the beneficiary; or where the defendant had entered under a lessee of real property, upon a promise to pay the rent to the landlord, and had subsequently occupied the premises, and paid part of the rent. It was further held that if the averment in the declaration, that the defendant promised the plaintiff to pay the note, was to be taken as referring to an express promise, such a promise would be void for want of consideration. But we find it difficult to reconcile the more recent case of *Perry v. Swasey*, 66 Massachusetts (12 Cushing), 36, A. D. 1853, with this distinction. There the defendant had agreed with the maker of a note with whom he was boarding, to take up and cancel the note, for which he was to pay nothing for board, till his bill equalled the sum due upon the note; after boarding some time, his bill was adjusted and receipted in full, the amount of the note being deducted and the balance paid by him in money; and at the same time he gave to the maker of the note a written agreement to pay the note, and to hold the maker harmless. Upon these facts, (together with a promise to the holder,) the court "inclined to the opinion," that an action for money had and received would lie in favor of the holder of the note; but it was distinctly held that an action would lie upon the defendant's promise to the maker; and that it raised an implied promise to the plaintiff. See also *Hicock v. McKay*, 78 Massachusetts (12 Gray), 218, A. D. 1858, where the same rule is to be implied from the opinion; although the court thought, that in the absence of evidence to show that the contract was made for the benefit of the third person, the promisee might maintain an action, upon an agreement to credit a third person a certain sum on account, for a consideration proceeding from the plaintiff.

property to the defendants Lawton and Wright, (the same Wright being a member of both firms,) upon the consideration, in part, that the latter would pay the debts of Faulkner & Wright, including specially the debt due to the plaintiffs. It appeared also that the property transferred to the defendants, was more than sufficient to pay all the debts. The defendants objected to the admission of the testimony tending to prove these facts, on two grounds; namely, that the verbal promise was void within the statute of frauds, and that the plaintiffs could not sue upon it; but the objections were overruled. There was no evidence of an express assent by the plaintiffs to this arrangement, or that it was communicated to them. The plaintiffs recovered a judgment, which was reversed upon a motion for a new trial. The opinion, by Dutton, J., argued both the questions at length, and concluded that both objections were well taken. "The agreement," he said, "was void, so far at least as the plaintiffs are concerned, by the statute of frauds." It was, he thought, against the policy of the statute to sustain the action; the danger, which it was intended to guard against, being "that creditors will endeavor by false parol testimony to save debts, which they will otherwise lose by the failure of the original debtor to pay." The learned judge said that this case was precisely the case which the legislature had in view; it being evident that the plaintiffs were endeavoring to hold Lawton and Wright, because they doubted the responsibility of Faulkner and Wright.

§ 422. The learned judge then proceeded to consider the arguments which had been urged in support of doctrines, which would permit a recovery upon this contract. In some of the cases, he said, a fear had been expressed that if the plaintiff was not allowed to recover, the statute would be made an instrument of fraud. But irrespective of the fact, that it was inconsistent to draw inferences from a case which the law would not permit to be proved, he thought that the danger of fraud had been overrated; for a defendant who denied the validity of his agreement on

this ground could not be permitted to retain the consideration. The learned judge continued: "Courts have also frequently been misled by not advertg to the distinction between an attempt to hold a person as surety for another, and merely compelling him to pay a sum of money which may happen to be the debt of another. If A sells a house to B for \$100, it is clearly immaterial to B whether he is to pay the money to A or to one of A's creditors. As a contract between A and B, there is no more danger that the fraud mentioned in the statute will be perpetrated than in any other contract. But the moment you allow the creditor of A to have an interest in this contract, and to have the right, either expressly or by implication, to sue upon it, as the plaintiffs claim to have in this case, the agreement is brought directly within both the letter and spirit of the statute." Some of the cases, said the learned judge, turn upon the question, whether the defendant received a full consideration; but this cannot affect the application of the statute. Others "seem to have been allowed on the ground that it appeared that some new and distinct consideration passed from the plaintiff to the defendant;" but these are mere extensions of a doctrine, to be found in the English lien cases, where the substance of the transaction was a sale by the plaintiff to the defendant. The learned judge concluded that branch of the opinion by saying that there was a tendency in recent cases "to adopt the true rule and to restore the statute to its original purpose," citing particularly *Curtis v. Brown* and *State Bank v. Mettler*.^(e)

(e) For an abstract of the last mentioned case see section 411. Upon the other objection the opinion is equally decisive against the plaintiffs; holding that they could not recover, because the promise was not made to the plaintiffs, or intended for their benefit, but for the benefit of the parties to it; nor was it founded upon a consideration furnished by the plaintiffs; nor did it appear that at the time they knew any thing of it. The case of *Treat v. Stanton*, 14 Connecticut, 445 (A. D. 1841), was cited as decisive against the plaintiffs upon this point. And it was held, that they could not recover upon the common count, because there were other persons interested, and an accounting was necessary; so that the only remedy was in equity.

§ 423. In PENNSYLVANIA, the recent case of *Shoemaker v. King*, 40 Pennsylvania, 107, A. D. 1861, is in exact accord with the case just cited, upon substantially the same facts. There a special verdict was found, to the effect that the plaintiff was a creditor of the firm of Harper and Reese, and they sold out all their firm property to the defendant, he agreeing with them to pay their debts, and the property being sufficient to pay the plaintiff and all the other creditors of the firm. Soon afterwards Harper informed the plaintiff of the defendant's promise; but there was no proof that any communication passed between the plaintiff and the defendant, except as implied from bringing this suit, from which the jury found "that he agreed to accept said promise." Upon this verdict the court below rendered a judgment for the plaintiff, which the Supreme Court reversed on error, and ordered judgment for the defendant. Lowrie, C. J., delivered the opinion in the following terms: "The decided weight of authority and of reason declares, that though such a contract as the present is valid between the immediate parties to it, it is void as a contract in favor of the creditors of one of them; unless they, as part of the arrangement, give up their original claims, and accept the new contract in their stead. Without this it is void, even when expressly made to those creditors, and of course it cannot be implied as made to them. While the old debt remains, the new contract cannot be a substituted, but only a collateral one; a promise to pay another's debt; and it is forbidden by the statute as a cause of action." "Yet we must not be understood as questioning that numerous class of cases, where a debtor puts money or other means in the hands of another, to be delivered to a particular creditor of his, and the creditor has been held to be entitled to sue. Some of this class of cases no doubt crowd hard upon the class to which the present one belongs. Yet they present merely a mode in which the debtor pays his own debt. That was only in part and incidentally a purpose of this arrangement. We may need, some day, to distinguish these classes more accurately, and we had better not

attempt it, until some case arises that demands such a distinction.”(f)

§ 424. The courts of NORTH CAROLINA appear to incline against allowing the creditor to maintain the action; although in the principal case the question was not fairly presented, as the result would have probably been the same in New York, upon the allegations of the declaration. In *Styron v. Bell*, 8 Jones, 222, A. D. 1860, the executor of one Pettijohn had sold at auction to the defendant, a schooner belonging to the estate, at a price much below its value, one of the conditions of the sale being that the purchaser should pay all the debts due by Pettijohn, on the schooner's account; and the plaintiff, to whom Pettijohn owed a debt for lighterage, brought this action to recover the same. It did not appear that the plaintiff was present at the sale; or that his debt was specifically mentioned; or that the plaintiff and defendant had any communication on the subject after the sale. The defendant's counsel submitted that the evidence did not sustain the declaration, which alleged that the promise was made to the plaintiff, and that the statute of frauds required the promise to be in writing; but the plaintiff had a verdict, and the judgment thereon was reversed on appeal. In the opinion of the Supreme Court, delivered by Manly, J., it was assumed that the question to be decided was whether there had been any valid substitution of one

(f) But the Supreme Court of Pennsylvania has now definitively settled the rule, that where the promise was made to the creditor, founded upon a fund placed in the hands of the promisor by the debtor, and constituting part of an agreement to which the three were parties, the promise is not within the statute, and the promisee may recover for its breach. See cases cited in chapter fifteenth, article third. And in *Maule v. Bucknell*, 50 Pennsylvania, 39, A. D. 1865, Strong, J., intimated a doubt whether *Shoemaker v. King* was correctly decided. The question, respecting the common law right of the beneficiary to recover upon a contract to which he was not a party, seems to have been settled in Pennsylvania in the affirmative. *Beers v. Robinson*, 9 Pennsylvania, 229 (1848); *Vincent v. Robinson*, 18 id., 96 (1851).

debtor for another. It was held that no such substitution had been accomplished here, because the plaintiff's original debtor had not been discharged; this action not being evidence of such a discharge, but only of his willingness to look to the defendant, as a collateral source from which the money might be obtained. It was further said that the cases, where a promise to one has been allowed to enure to the benefit of another, turn upon the idea of principal and agent. The opinion concluded by saying that the statute of frauds "would be an obstacle to the recovery in other points of view; but we think it unnecessary to enter upon that."

§ 425. In TENNESSEE it was held in *Campbell v. Findley*, 3 Humphreys, 330, A. D. 1842, that the defendant's promise to the debtor, to pay to the plaintiff the debt due by the promisee, made in consideration of the sale of personal property by the debtor, was within the statute of frauds; the court putting the decision on that ground, and, declining to consider the question, whether there was sufficient privity on the part of the plaintiff to entitle him to sue. But the case is avowedly at war with the whole doctrine that a promise to the debtor is not within the statute; as we conceive the other cases, holding that the statute applies to such an action, are in principle and practical effect. (g)

§ 426. And in WISCONSIN the Supreme Court decided, or at least intimated very strongly, in *Emerick v. Sanders*, 1 Wisconsin, 77, A. D. 1853, that a creditor could not recover under the same circumstances; and for that reason, with others, held that a subsequent promise to him was within the statute of frauds. The case will be cited more at length hereafter, in connection with another principle involved therein. (h)

(g) There is a dictum in *Brice v. King*, 1 Head, 152 (A. D. 1858), favoring the broad rule, that at common law the person to be benefited by a contract may sue for its breach.

(h) Chapter fifteenth, article second.

CHAPTER THIRTEENTH.

THE SAME SUBJECT CONTINUED — THE RULE WITH RESPECT TO CONTRACTS OF INDEMNITY, AGAINST LIABILITIES THEREAFTER TO BE INCURRED BY THE PROMISEE.

§ 427. It is frequently said, in general terms, that one of the questions arising under the statute of frauds, which are yet unsettled by the authorities, is whether contracts of indemnity are within its provisions; but the promises involved in most of the cases considered in the eleventh chapter, were contracts of indemnity, in the broadest sense of the term. They differ from those which are now to be examined in nothing, except that the question there presented arose upon a promise to assume a liability already resting upon the promisee, which for that reason required a new and distinct consideration, in order to be valid at common law. In those which will form the subject of this chapter, the promise was to indemnify the promisee against a liability thereafter to be incurred by him; and it consequently required no consideration to sustain it at common law, beyond the incurring of the liability, pursuant to the request of the promisor. They are divided into two classes, namely, those where the liability, against which the promisee was indemnified, was to be incurred by him without the intervention of any third person, who could be said to be primarily liable; and those where it was to be incurred by him, at the request of the promisor, but as security for the fulfilment of a third person's engagement to a fourth person. The authorities seem to agree that in the first class the promise is not within the statute; but we shall find that with respect to the second, there is great diversity of opinion.

ARTICLE I.

Where the promise was to indemnify the promisee against a liability to be incurred by him alone without the intervention of any third person.

§ 428. With respect to this kind of indemnity, there is little difficulty in ascertaining and applying the correct rule. Promises of this character come directly within the terms of the rule, sustaining verbal engagements made to the debtor himself; there being no question, such as arises in those belonging to the other class, whether the existence of a primary liability of another, for the payment of the same debt or the fulfilment of the same duty, will not render the engagement collateral. And accordingly we find that the few decisions, which cast a doubt upon the validity of such contracts, are contained in the overruled cases, which deny the existence of the fifth rule; or were evidently made through inadvertence.(a)

§ 429. In *Howes v. Martin*, 1 Espinasse, 162, tried at nisi prius, A. D. 1794, such an engagement was held not to be within the statute, although the court failed to assign the reason therefor which is now regarded as the correct one. There the declaration was for money laid out and expended to the defendant's use, with the common counts; and at the trial it appeared that the plaintiff had accepted a certain bill for the accommodation of the defendant; and an action having been brought against her upon the acceptance, she informed the defendant of the fact, and at his request defended the action, but was defeated; and this action was brought to recover the amount of the verdict against her, and the costs. The defendant's counsel objected that the action could not be maintained, as there was no note in writing; but Lord Kenyon overruled

(a) One of the reasons assigned by the court for the decision in *Wells v. Mann*, 52 Barbour (N. Y.), 263, A. D. 1867, was that a promise by the defendant to the plaintiff to indemnify him against an action to be commenced by another person, was within the statute; but this was said incidentally, and, it is believed, inadvertently.

the objection, and held that the case was not within the statute, because the plaintiff had no consideration for the acceptance, and the defence to the action was on the defendant's account and for his benefit; that as he was interested, and directed the defence to be made, whereby he might have been benefited, the money must be considered as having been laid out by the plaintiff to his use and upon his account.

§ 430. But in *Winckworth v. Mills*, 2 Espinasse, 484, A. D. 1796, the question was squarely presented, and decided erroneously, according to the modern authorities. There one Sharp had made a promissory note to the order of Taylor and Son, payable at their house, which had been indorsed by Taylor and Son to the defendant, and by him to another person, who had indorsed it to the plaintiff. When it became due, the plaintiff's clerk called at the house of Taylor and Son for payment, but by mistake left the note behind, and on his returning, and demanding it, they denied having it, and it was lost; thereupon the plaintiff immediately informed the defendant of the facts, who furnished the plaintiff with a copy of the note, and promised to indemnify him, if he would endeavor to recover the amount of it from Taylor and Son, or the maker. The plaintiff succeeded in collecting one-half of the amount, and now brought an action to recover the expenses, adding a count against the defendant as indorser of the note. At the trial, there being no writing showing the promise, Lord Kenyon ruled that the plaintiff could recover only the unpaid part of the note, and a verdict was taken for that amount. The report adds that his Lordship offered to save the point; but the plaintiff's counsel declined it, and the verdict was "acquiesced in."

§ 431. But in *Adams v. Dansey*, 6 Bingham, 506, and 4 Moore and Payne, 245, decided A. D. 1830, the Court of Common Pleas anticipated the decision of the King's Bench in *Eastwood v. Kenyon*, 11 Adolphus and Ellis,

438, by holding that a similar promise was not within the statute, for the reason that it was made to the person who was to incur the liability; and further that, under the circumstances of the case, the promise was also valid, with respect to a liability which had been previously incurred. There the plaintiff, as the occupant of lands in a certain parish, had been sued by the vicar for tithes; and the landowners of the parish, relying on a *modus*, resolved that they would contribute *pro rata* to the defence of the suit; but the plaintiff refused to defend, as he had quitted the parish; whereupon the defendant, who was a landowner of the parish, orally promised to indemnify him. The plaintiff, relying upon this promise, defended the suit accordingly; and now brought this action to recover the costs adjudged against him therein, part of which had been incurred before the defendant's promise was made. There was a verdict for the plaintiff, and the defendant obtained a rule *nisi* to set aside the verdict, or to reduce the damages to the amount of costs incurred subsequently to the promise, which, after argument, was discharged.

§ 432. Tindal, C. J., said: "Here, as between Adams and Dansey, what promise is there as to the debt, default or miscarriage of another? It is a direct promise to repay Adams any money which might be paid by him, for costs in the suit between the vicar and Adams." As to the costs previously incurred, he said that it was competent for the plaintiff to make any bargain he pleased, as the price of resisting the tithes suit for the defendant's benefit. Gaselee, J., said, "It is a liability to which the plaintiff himself was to be exposed at the request of the defendant," and as to the bygone costs the vicar's claim had been resisted at the instance of the defendant, and the plaintiff was then liable for them. Bosanquet, J., said that the plaintiff "was at liberty to impose such terms as he pleased, either as to the past or the future costs, and the debt, for the discharge of which he stipulated, was his own debt, not that of a third person."

§ 483. The same decision was made A. D. 1800, by the New York Supreme Court in *Allaire v. Ouland*, 2 Johnson's Cases, 52. There the defendant had directed the plaintiff, who was his hired servant, to enter a meadow, which the plaintiff said belonged to him, but which was in fact the property of another, and promised to indemnify him for so doing; and the plaintiff, having done so, was sued for the trespass, and a judgment recovered against him; whereupon he brought this action upon the defendant's promise. In the court below a motion for a nonsuit was overruled; and the plaintiff having had a verdict and judgment, a writ of error was brought from the judgment to the Supreme Court, seven errors having been assigned by the defendant, of which the second was that the promise of indemnity should have been in writing, it being for the default of another. The judgment below was affirmed, the second error assigned being disposed of in the prevailing opinion, delivered by Radcliff, J., as follows: "The promise was not to indemnify for the default of another; but was made to the plaintiff himself, for an act to be done by him as the servant of the defendant below. It was an original undertaking, and not a collateral promise."

§ 484. So in *Marcy v. Crawford*, 16 Connecticut, 549, A. D. 1844, it appeared at the trial in the court below, that the defendant had entered into a verbal agreement with the plaintiff, that if one S. P. C. should enter upon certain lands, and fish in a certain mill pond, and should be prosecuted therefor by J. C., who had forbidden such entry and fishing, he (the defendant) would pay the plaintiff one half the amount which J. C. should recover, and one half the expenses of defending the suit; and the plaintiff had made a corresponding contract with the defendant, in case the latter should in like manner enter and fish. The defendant insisted, with other objections to the recovery, that the promise was within the statute; but under the ruling of the court, the plaintiff had a verdict and judgment, which was affirmed on error. Hinman, J., delivering the opin-

ion of the court, said, upon this point, that the promise was original. "It could not be," he continued, "for the debt of S. P. C. ; for he owed none. It was not for his default ; but was rather a promise of indemnity, to a certain extent, for doing a particular act, like the promise of indemnity to an officer taking property, which it may be doubted whether the creditor can hold."

§ 435. So in *Peck v. F. W. Thompson and C. Thompson*, 15 Vermont, 637, A. D. 1843, the defendant F. W. Thompson had given the plaintiff a verbal order on one Campbell, to pay the plaintiff \$88, upon a settlement of a debt which he owed to the plaintiff ; but Campbell refused to pay the money without a written order, unless the plaintiff would give his individual receipt for the money, to be accounted for to Campbell on demand ; which the plaintiff gave accordingly ; subsequently Campbell threatened to sue the plaintiff on his receipt, and the latter notified the defendant F. W. Thompson of this threat ; and he and his father, the defendant Charles Thompson, both promised the plaintiff, that if he would defend the suit, they would save him harmless from all damages and costs. The plaintiff thereupon defended the suit, which resulted in a judgment against him ; and he then brought this action on the defendants' promise. It was objected that the promise was void against Charles Thompson ; but the plaintiff had a verdict, and the judgment thereon was affirmed. The court held that the promise was not within the statute, on the ground that the agreement did not immediately relate to any debt which F. W. Thompson owed to the plaintiff ; but to a disputed claim against the plaintiff asserted by Campbell, who was a stranger to the consideration and to the agreement ; both of which originated entirely between the present parties.

§ 436. The same rule was followed, with but little variety as to the facts, in *Goodspeed v. Fuller*, 46 Maine, 141, A. D. 1858 ; *Flemm v. Whitmore*, 23 Missouri, 430, A. D. 1856, and *Dorwin v. Smith*, 35 Vermont, 69, A. D. 1862.

In *Stark v. Raney*, 18 California, 622, A. D. 1861, it was held that a verbal promise, by the plaintiff in an execution, to indemnify a sheriff for seizing property claimed by another, was not within the statute; and in *Tarr v. Northey*, 17 Maine, 113, A. D. 1840, a similar promise by a stranger was sustained, although the plaintiff in the execution also joined in the request to the officer; it appearing that the latter was not satisfied with the plaintiff's ability to indemnify him, and refused to levy upon the property without the defendant's promise of indemnity.

§ 437. But a promise of indemnity cannot be made the medium of saving from the operation of the statute, an engagement of the promisor to respond for an existing liability of a third person to the promisee; as where the promisee has a demand against a third person, and the promisor engages to pay the same, as distinguished from the expenses of the litigation; in case the promisee shall fail in an attempt to recover the amount from a fourth person. This was held, and very properly, in *Turner v. Hubbell*, 2 Day (Connecticut), 457, decided A. D. 1807. There the declaration alleged, in substance, that the defendant's son had received on board a vessel at Newbern, of which he was commander, certain merchandise of the plaintiff to be transported to New York, and that he had sold and converted it to his own use; that on the plaintiff proposing to institute a suit against the son, the defendant requested him to forbear doing so, and to sue one Selby therefor, who, as the defendant alleged, was equally concerned in the conversion of the goods, and had received the proceeds; and in consideration that he would do so, promised that he would pay the damages so sustained by the plaintiff, in case he should fail in the suit against Selby, or be unable to collect a judgment against him; and that the plaintiff accordingly sued Selby, but was defeated. At the trial the plaintiff offered to prove a verbal promise as laid in the declaration, which was ruled out, as being within the statute of frauds; and a

verdict having been rendered for the defendant, the plaintiff brought error on the judgment. In the Supreme Court of Errors the judgment was unanimously affirmed, no opinion having been delivered.

ARTICLE II.

Where the promise was to indemnify the promisee against a liability to be incurred by him, at the request of the promisor only; but as security for the fulfilment of a third person's engagement to a fourth.

§ 438. Where one person becomes a surety for another, at the latter's request, and for his benefit, the request necessarily implies a promise of indemnity; and if another person unites with the first in the request, and makes an express promise to indemnify the surety, his promise must necessarily be within the statute, as being collateral to the implied promise of the principal. Of course the case is still stronger, if the principal has also made an express promise. But it frequently happens that he who is primarily bound in an undertaking, for his fulfilment whereof another person has also become liable, was not a party to the transaction wherein the latter was induced to assume the liability; but that such consent was given solely upon the faith of an express promise of a stranger to the undertaking, that he would indemnify the surety. Whether a verbal promise of the indemnitor is, in such a case, within the statute, is a question upon which the authorities are very confused and discordant. On the one hand it is argued, that as it is the duty of every principal to protect his surety against loss, the promisor's contract is by its terms to answer for the default or mis-carriage of another. And again it is said that inasmuch as the law always implies an undertaking, on the part of every principal, to indemnify his surety, the engagement of another to indemnify him also is necessarily concurrent with, and collateral to, an engagement of the person primarily bound upon the undertaking; which the law implies, if no express engagement to that effect has been made.

§ 439. On the other hand it is insisted, that in the absence of any request on the part of the third person to the promisee, that the latter would enter into the undertaking for his benefit, he is to be regarded as simply assenting to the transaction, not as entering into any engagement with respect thereto ; so that in case the promisee shall be thereafter called upon to make good his undertaking, the third person's liability to him does not grow out of any implied promise, made at the time when the principal contract was entered into ; but out of the actual payment by him of the damages which he has become liable to pay. Such payment, it is conceded, raises an implied assumpsit, upon which the surety is entitled to recover ; but it is contended that the principal's liability to an action flows from a fact, existing subsequent in time to the engagement of the promisor ; so that such engagement is not within the statute, upon the principle that a contingency arising after the promise was made, will not suffice to draw it within the statute, if it was not so at the time when it was entered into. (a) With respect to the suggestion that the engagement is to respond for the miscarriage or default of the third person, it is further said that the default, against which the promisee is indemnified, is not a default in a duty to him, but to the fourth person ; and therefore the promise is good without writing, within the rule which excludes from the operation of the statute, promises not made to the person entitled to enforce the liability assumed by the promisor.

§ 440. This contradiction in the cases upon this important question, had its origin in England, where the courts have vacillated between the two lines of argument, thereby causing a corresponding vacillation in the decisions in the United States ; as will be apparent by a comparison of dates between the English and American cases. In *Thomas v. Cook*, 8 Barnewall and Cresswell, 728, decided

(a) Section 152.

A. D. 1828, (b) the Court of King's Bench sustained, as not being within the statute, a promise made by one of two persons about to become sureties for a third, that he would indemnify his fellow surety against loss. There the first three counts of the declaration, which were in substance the same, stated that one Cook, since deceased, had been in partnership with one Morris; and upon dissolving the firm it was agreed between them, that Cook should indemnify Morris against the debts of the firm, by a bond executed by himself and two other persons; and in consideration that the plaintiff, at the defendant's request, would execute such a bond with the defendant and Cook, the defendant undertook to indemnify him against so doing; concluding with averments of a breach, damages, etc. The fourth count of the declaration stated, that in consideration that the defendant, and Cook, with the plaintiff as Cook's surety, would together draw a bill of exchange upon certain other persons, and indorse and deliver it to Morris, to be negotiated for his own use, the defendant likewise undertook to indemnify him; averring also a breach and damages. The declaration also contained the general counts. At the trial the plaintiff proved the execution of the bond and of the bill at the defendant's request, and a verbal promise of indemnity by the defendant; and also various payments by the plaintiff on account of the debts and the bill of exchange, the amount of which was reduced by moneys received from the estate of Cook to 300%. ; and the defendant objecting that the promise was within the statute, and that he was liable only for contribution as a co-surety, the plaintiff had a verdict for 300%. with leave to the defendant to move to reduce it to 150%.

§ 441. A rule nisi was accordingly obtained, which after argument was discharged, Bayley, J., saying: "Here the

(b) S. C., 3 Manning and Ryland, 444. This report states that Littledale, J., concurred in the decision; but the report in 8 Barnewall and Cresswell states that he was absent. Lord Denman, in the next case, assumed that this judgment was pronounced by two judges only.

bond was given to Morris as the creditor ; but the promise in question was not made to him. A promise to him would have been to answer for the default of the debtor. But it being necessary for W. Cook, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and bill of exchange, and undertook to save him harmless. A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the statute of frauds ; and if so, there was sufficient evidence to entitle the plaintiff to a verdict for 300*l*." Parke, J., said : "This was not a promise to answer for the debt, default or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same. The rule for reducing the verdict ought therefore to be discharged."

§ 442. But in 1839 the same court, in *Green v. Cresswell*, 10 Adolphus and Ellis, 453, (c) made a decision which was certainly intended to overrule the case of *Thomas v. Cook*, and has generally been regarded as having had that effect. There the declaration stated that John Reay had sued Joseph Hadley by *capias*, on which Hadley had been arrested ; and in consideration that the plaintiff, at the request of the defendant, would become bail for Hadley upon the *capias*, the defendant promised to indemnify him ; but Hadley did not put in special bail, whereby, etc. At the trial the plaintiff had a verdict ; but, as the pleadings showed that the promise was verbal, a rule nisi to arrest the judgment was obtained, which the court, after argument, made absolute. Lord Denman, C. J., who delivered the opinion of the court, said : "The promise in effect is, 'If you will become bail for Hadley, and Hadley, by not paying or appearing, forfeits his bail bond, I will save you harmless from all the consequences of your

(c) S. C., 2 Perry and Davison, 430, and 4 Jurist, 169.

becoming bail. If Hadley fails to do what is right towards you, I will do it instead of him.' If there had been no decisions on the subject, it would appear impossible to make a reasonable doubt that this is answering for the default of another."

§ 443. His Lordship then referred to *Thomas v. Cook*, and added: "But the reasoning in this case does not appear to us satisfactory in support of the doctrine there laid down; which, taken in its full extent, would repeal the statute. For every promise to become answerable for the debt or default of another may be shaped as an indemnity; but, even in that shape, we cannot see why it may not be within the words of the statute. Within the mischief of the statute it most certainly falls." "A distinction," continued his Lordship, "was also hinted at, from the circumstance of Hadley's debt being due to a third person, and the default therefor incurred towards him, not towards the bail. But here again is the surmise of an intention in the legislature which none of its language bears out; and besides, may it not be said that the arrested debtor, who obtains his freedom by being bailed, undertakes to his bail to keep them harmless, by paying the debt or surrendering? There does not appear any objections to the test laid down in the note to 1 Williams's Saunders, 211 c; and it is decisive in favor of the objection. The original party remained liable, and the defendant incurred no liability except from his promise."

§ 444. In *Reader v. Kingham*,^(d) and in *Fitzgerald v. Dressler*,^(e) as well as in the two cases which will be next cited, to complete the English decisions upon this point, the soundness of the decision in *Green v. Cresswell* is much questioned; and it must be regarded, in the present state of the cases, as of very doubtful authority in England. But in the United States, it has had the effect of unsettling entirely the law upon this question.

(d) Ante, §§ 367, 368.

(e) Post, §§ 590, 591.

§ 445. In a recent case in the Exchequer, *Batson v. King*, 4 Hurlstone and Norman, 739, A. D. 1859, (f) the defendant and one Dalton, desiring, (as was found by the jury,) to raise money for their joint benefit, applied to the plaintiff to draw a bill upon Dalton, to be accepted by him and indorsed by the defendant; and the plaintiff did so, upon the defendant's agreement that he should not be called upon to pay; but when the bill became due the plaintiff was compelled to pay it; whereupon he brought this action for money paid, and had a verdict for the whole amount. Upon an application for a rule to reduce the verdict by one-half, on the ground that the promise was within the statute, Pollock, C. B., said: "If a man says to another, 'If you will, at my request, put your name to a bill of exchange, I will save you harmless,' that is not within the statute. It is not a responsibility for a debt of another. It amounts to a contract by one, that if the other will put himself in a certain situation, the first will indemnify him against the consequences. In *Green v. Cresswell*, Lord Denman pointed out a distinction between that case, and one where the defendant is a co-surety.(g) I do not think that the case itself was rightly decided." And Martin, B., immediately added: "If the argument for the defendant were well founded it would apply to all cases of joint suretyship."

§ 446. But a rule nisi was nevertheless granted; and counsel having been heard in support of it, the rule was discharged. The court held that although as between the holder and the parties to the bill, the acceptor was primarily liable, yet as between themselves, the real nature of the transaction might be shown; and it appeared here that in reality Dalton and the defendant were principals, so that the point decided in *Green v. Cresswell* did not

(f) S. C., 28 Law Journal, New Series, Exchequer, 327.

(g) The learned Chief Baron doubtless referred to a remark of Patterson, J., during the argument, which is also mentioned by Denio, J., in his opinion in *Barry v. Ransom*, 12 New York, 432, cited post, § 453, 454.

arise. "It might have been otherwise," said Martin, B., "if Dalton had been entirely separate from the defendant, and if the plaintiff had become responsible for Dalton, upon the defendant's promise to indemnify him. Dalton and the defendant being both principals, the only answer which the defendant had was by plea in abatement for the non joinder of Dalton." The other Barons concurred in this opinion.

§ 447. In the still more recent case of *Cripps v. Hartnoll*, 8 Jurist New Series, 1010, (h) decided in the year 1862 in the Queen's Bench, a distinction was taken, between a promise to indemnify bail in a civil, and in a criminal cause, which is apparently unknown in this country. There the defendant had requested the plaintiff to become bail for his (the defendant's) daughter, to answer a criminal charge, and had verbally agreed to indemnify him for so doing. The plaintiff entered into a recognizance accordingly; but the daughter did not appear, whereby the recognizance became estreated, and he was compelled to pay the amount thereof, with costs; he then brought this action upon the defendant's promise of indemnity. At the trial he was nonsuited upon the objection that the promise was within the statute. A rule nisi was obtained to enter the verdict for the plaintiff; and after argument the court discharged the rule, stating that they were bound by the case of *Green v. Cresswell*, and it made no substantial difference whether the bail was in a civil or a criminal case; although in delivering their opinion, (per Crompton, J.,) they intimated a doubt whether that case could be sustained on the merits, and that a court of error might possibly come to a different conclusion.

§ 448. Accordingly an appeal was taken by the plaintiff to the Exchequer Chamber, which was decided in 1863,

(h) S. C., 31 Law Journal, N. S., (Q. B.) 150; 2 Best and Smith, 697; and 6 Law Times (N. S.), 605.

and is reported in 10 Jurist, New Series, 200.(i) There the judgment of the court below was reversed, unanimously, Pollock, C. B., delivering the opinion, and resting the decision upon a distinction between bail in a civil and in a criminal case. He said that in the latter case there is no contract on the part of the person bailed, to indemnify the person who bailed him against his non-appearance. "There is in this case," he continued, "no debt, and with respect to the person who gives bail, there is hardly a duty; and it may well be, that a promise to indemnify the bail in a criminal matter should be considered purely as an indemnity, and not as the case of a promise to answer for the default or debt of another. It has been laid down in many cases that a mere promise of indemnity is not within the statute of frauds. On the other hand, where the promise is to answer for the default of another, it is within the statute. No doubt some cases might be put, where the promise to answer for the default or debt of another, would also involve a promise of what might be called very properly and legally an indemnity. Where that is the case, (as it is not here,) in all probability it might come within the statute of frauds. We are not called upon to overrule *Green v. Cresswell*, nor are we called upon to say that we entirely concur in it; but we take this distinction, that in the present case the bail was given for the appearance of the criminal, and not bail for the purpose of answering a debt or default in a civil case." In the Jurist report it is merely stated that the other judges concurred; but the other reports include also an opinion of Williams, J., in which he said that he did not "think it at all necessary to say whether that case is good law or not;" but, "whether or no in a case where the plaintiff becomes bail for a stranger in a civil suit, there is a duty, as between the defendant in the action and the surety, that he will render or pay the debt, so as to reconcile the case of *Green v. Cresswell* with the ordinary rule,

(i) Also 32 Law Journal, N. S., (Q. B.) 381; 11 Weekly Reporter, 953; 8 Law Times, N. S., 765.

that the statute applies only to promises made to a person for whom another is answerable," he thought that there was no debt or duty due from the party in a criminal suit. (*j*)

§ 449. In New York the question arose as early as 1813 in *Harrison v. Sawtel*, 10 Johnson, 242. There it appeared that Sawtel, the plaintiff in the court below, was bail to the sheriff in a suit against one Foot; and that at

(*j*) The question whether a contract on the part of the accused to indemnify his bail in a criminal case will be implied, has not, to our knowledge, been raised in this country. In *Jones v. Orchard*, 16 Common Bench Reports, 614, 1 Jurist, N. S., 936, and 24 Law Journal, N. S., C. P., 229, decided in 1855, the defendant had been indicted in the Central Criminal Court for a conspiracy, and the indictment had been removed to the court of Queen's Bench; where the plaintiff, at the defendant's request, entered into a recognizance with the defendant for his appearance, etc. The defendant was convicted in his absence, and the recognizance estreated for nonpayment of the prosecutor's costs; the bail being expressly made liable for such costs by statute, although nothing was said about them in the recognizance. This action was brought upon the implied contract of indemnity, and after verdict, it was held that the action could be maintained. Jarvis, C. J., delivering the opinion of the court, intimated very strongly that the law would not imply a contract, on the part of the principal, to indemnify the bail against the consequences of the recognizance becoming estreated for the nonappearance of the principal; because an express contract to that effect would be contrary to public policy; inasmuch as it would be in effect giving the public the security of one person only instead of two. But as in this case the recognizance was estreated only for nonpayment of costs, the law would imply a promise of indemnity to that extent. The rule, of which the court apparently approved in this case, and which was laid down positively in *Cripps v. Hartnoll*, would bear very hardly upon an innocent person accused of crime, who, although possessed of means, was a stranger in the country where he was arrested, or for some other reason had no friends who were both willing and qualified to become bail; and the idea that public policy requires its establishment appears to us very fanciful. In the absence of direct authority in its support, we risk little in saying that it will not be adopted in this country. See *Holmes v. Knights*, 10 New Hampshire, 175, and *Kingsley v. Balcom*, 4 Barbour, 131, cited post, in each of which the question arose upon an indemnity to bail in a criminal proceeding, and no suggestion was made that the rule was different from what it would be in a civil case. Of course we do not refer to a case, where the bail had been indemnified for the purpose of procuring their assent to the prisoner's escape.

the request of Harrison, "who held himself bound to indemnify Foot in that action" (but how, or for what reason the report does not state), Sawtel became special bail, and Harrison promised to indemnify him. A judgment for the plaintiff was affirmed in the Supreme Court; the following being all of the opinion material to the question. "*Per curiam*. This was not a promise to pay the debt, or answer for the default of another person. It was an original promise between the parties to it, that one of them would indemnify the other, if he would become special bail for a third person, whom the defendant was bound to protect and save harmless in the suit. It was done at the request and for the benefit of the defendant, as it saved him from becoming bail himself, or procuring some other person to become bail. The case had nothing to do with the statute of frauds; and there was a consideration for the promise, the advantage resulting to the defendant from the plaintiff's becoming bail. The defendant being answerable for the party sued, the becoming bail for the party, at the request of the defendant, was as beneficial as if the plaintiff had become bail for the defendant himself." (k)

§ 450. But a ruling unquestionably in point was made by the New York Supreme Court, in *Chapin v. Merrill*, 4 Wendell, 657, A. D. 1830. There the plaintiff, at the request of the defendant and upon his promise to indemnify him, had joined one Ransom in an agreement under seal, to guaranty the payment of goods to be supplied by Hickok and Hart, a mercantile firm, to Ransom's son. Upon the trial of the action, the plaintiff had a verdict

(k) It seems to have been assumed in most of the subsequent cases, that the defendant's liability to Foot was the distinguishing feature, upon which the court thought that the promise was not within the statute. But, as we read this opinion, the stress seems to be laid upon that fact, principally, if not entirely, to show that there was a sufficient consideration for the promise. Upon this question there was room for considerable doubt, as the plaintiff was already bail to the sheriff, (and so bound to put in special bail,) at the time when the defendant's promise was made.

under the judge's charge, which the defendant moved to set aside. The motion was denied, Marcy, J., saying upon this point: "This is clearly an original undertaking; it was not made with the party buying or selling the goods. The goods sold by Hickok & Hart to Ransom were not the consideration for the promise." He held also that the consideration was the harm to the plaintiff, and that it was sufficient to sustain the promise, although the defendant received no benefit from the transaction. The case of *Thomas v. Cook*, although decided two years previously, is not cited; and, what is more remarkable, there is no allusion in the opinion to *Harrison v. Sawtel*.

§ 451. This case was doubted by Cowen, J., in *Carville v. Crane*, 5 Hill, 484,^(l) which did not, however, call for any expression of opinion upon the point; but in 1848 it was overruled by the present Supreme Court of New York in *Kingsley v. Balcome*, 4 Barbour, 131. The decision rested chiefly upon the authority of *Green v. Cresswell*, which, as was mentioned in commenting upon that case, has since been very much shaken in England; and in truth it is now settled there, that the decision does not cover the precise point adjudged in *Kingsley v. Balcome*.^(m) In the latter case it appeared that the plaintiff had entered into a recognizance for the appearance of one McMillen, to answer to a charge of perjury, at the request of the defendant and upon his promise of indemnity; but whether McMillen also joined in the request is not stated. McMillen having failed to appear, the plaintiff had been compelled to pay the full penalty of the recognizance. To a declaration setting forth these facts, the defendant pleaded that the promise was not in writing, and the plaintiff demurred to the plea.

§ 452. Sill, J., delivered the opinion of the court, overruling the demurrer. After citing the statute, he said that

(l) Cited ante, §§ 209, 210.

(m) *Cripps v. Hartnoll*, ante, §§ 447, 448.

"to the plain common sense of every mind, the promise of the defendant would be deemed a promise to answer for the default of McMillen, and to indemnify the plaintiff for his miscarriage;" but he added that it was necessary to look at the decisions, for the meaning of this otherwise plain provision of the statute. After mentioning and commenting upon *Harrison v. Sawtel*, and such Massachusetts cases as had been decided up to that time, all of which he either distinguished from the case at bar, or condemned as unsound, the learned judge recapitulated the facts of *Chapin v. Merrill*, and contended that it was erroneously decided; because when the younger Ransom availed himself of the arrangement, which had been made by Merrill with Chapin for his benefit, and used the credit of Chapin, "he adopted and sanctioned what Merrill had done for him, and created the relation of principal and surety between himself and Chapin," so that the law implied a promise on his part to indemnify Chapin. It was no answer, the learned judge thought, to say that Chapin's covenant was to another mercantile firm; for Ransom junior had assumed two distinct obligations; one to the vendor of the goods, and another to Chapin. Merrill's promise was not collateral to the first, but it was clearly so to the second. "The case," the learned judge said, "stands unsupported by any decision in our courts. It has not been relied upon or cited as authority for any subsequent adjudication, or received the sanction of any of our courts or judges."⁽ⁿ⁾ The opinion then referred to *Green v. Cresswell*, the facts in which, the learned judge thought, "are precisely like those in the case before us, except that the plaintiff was bail in a civil case instead of a criminal one." And he adopted that case as authority for his conclusion that the plea was good.

§ 453. The case of *Barry v. Ransom*, 12 New York (2 Kernan), 462, decided in 1855, takes a distinction, which

(n) If this remark was intended to include courts in other States, it was erroneous, as the subsequent pages will show.

reconciles the conflicting decisions in one species of cases, presenting this perplexing question. In brief, the question before the Court of Appeals was, whether the administratrix of Felix O'Neil, a surety in a tax collector's bond, who had paid the amount of a defalcation of the collector, was entitled to compel contribution from one McGloin, who had also become a surety in the bond, but at the request of O'Neil, and upon the latter's promise to indemnify him. In the court below, a referee reported that McGloin was not bound to contribute any thing. The report was confirmed and a decree made, by which the estate of O'Neil was ultimately left to bear the whole of the liability arising upon the bond. The administratrix of O'Neil appealed to the Court of Appeals, where the judgment of the court below was affirmed. Denio, J., delivering the opinion of the court, upon the question whether the undertaking should have been in writing to satisfy the statute of frauds, said that if the case was to be considered, irrespective of the circumstance that O'Neil was also a surety in the bond, there were adjudications on both sides of the question.

§ 454. Citing the different adjudications upon the point up to that time, the learned judge added, that those where the promisor was himself bound for the third person's default, are uniform, in holding that the contract is not affected by the statute. Such was the case of *Thomas v. Cook*, which is overruled by the subsequent case of *Green v. Cresswell*, unless the distinction to which he had adverted is material; but in the latter case the promisor was not a party to the instrument. This difference between the cases was suggested by counsel, upon the argument of *Green v. Cresswell*, and apparently made a favorable impression upon one of the judges; but in the opinion the court proceeded upon a disapproval of the ruling in *Thomas v. Cook*. In the case at bar, the learned judge added, O'Neil's engagement to answer for the default of the collector was in writing, and he was under no greater obligation to respond to the corporation therefor, in con-

sequence of his promise to McGloin, than if he had not made the latter. Lord Denman's objection to holding the promise good in *Green v. Cresswell*, was that the statute might be evaded. "This reason," said the learned judge, "certainly does not apply where the indemnitor is otherwise bound in writing, for the party whose default is to be provided against. I am of opinion that where a person is about to become bound by writing to answer for the default of a third party, and he procures another to be bound with him in the same obligation, by promising to indemnify him, that this is an original promise and not within this branch of the statute of frauds."

§ 455. In the course of his opinion in *Mallory v. Gillett*, 21 New York, 412, Comstock, J., classed this species of promises among those which were without the statute,^(o) but the remark was obiter, and in the subsequent case of *Baker v. Dillmann*, 12 Abbott's Practice Reports, 313, and 21 Howard's Practice Reports, 444 (A. D. 1861), the New York Supreme Court refused to recognize this dictum, and again followed the rule laid down in *Kingsley v. Balcome*. The plaintiff sued as assignee of one Schurig, to recover a sum paid by Schurig, upon his guaranty given to Sarah Case, to secure the payment of rent reserved in a lease from her to the Brooklyn Turn Verein, an unincorporated association, of which he and the defendants were members. It was proved that after Schurig had ceased to be a member of the association, and before the rent for which he was subsequently sued had become payable, the defendants signed "a declaration," which the court regarded as a contract to indemnify him, not expressing the consideration. Emott, J., delivering the opinion of the court, held that *Chapin v. Merrill* was overruled by *Kingsley v. Balcome*; and he referred to *Green v. Cresswell* as an authority to show that a promise to indemnify, in such a case as this, was within the statute. He added that he thought that upon principle the result

(o) See ante, § 64.

would be the same. Judgment upon the exceptions taken at the trial, was accordingly ordered for the defendant; but the learned judge also assigned, as a reason for his decision, that there was no consideration in fact for the contract; and he intimated that if the plaintiff had any remedy, it was by an action for contribution. Under these decisions all that can be said is, that the rule in New York awaits a settlement by the court of last resort; except in cases where the promisor and promisee were parties to the instrument, which formed the subject of the promise.

§ 456. In *Perley v. Spring*, 12 Massachusetts, 297, decided in 1815, and again in *Chapin v. Lapham*, 37 Massachusetts (20 Pickering), 467, decided in 1838, both of which are cited previously upon other points, (p) a promise to indemnify the plaintiff, for becoming surety for a third person to a fourth person was held not to be within the statute; but in each case other reasons are principally relied upon for the decision. And although in *Blake v. Cole*, 39 Massachusetts (22 Pickering), 97, A. D. 1839, the point was presented directly for adjudication, and the court distinctly determined it in favor of the plaintiff; the authority of the case upon this point has been sometimes doubted; partly because so much stress was laid in the opinion upon the objection that the promise was not to be fulfilled within a year; and partly on account of the peculiar reason assigned by the court for the ruling upon this clause of the statute. The plaintiff's intestate and the defendant had become sureties for one Hatch, the son of the plaintiff's intestate, on a probate bond given by him as administrator of a deceased person; and the plaintiff, having been compelled to pay a sum for Hatch's default, sued for contribution. The defence was that the defendant executed the bond, at the request of the plaintiff's intestate, and upon the latter's promise to indemnify him. It appeared at the trial that the defendant had been applied to by Hatch junior to execute the bond, and had

(p) ALIA, §§ 171, 264.

refused to do so; whereupon the intestate had said, "Well, if you will not do it for him, do it for me; I will hold you harmless;" and the defendant had then answered that he would sign it. A verdict for the defendant having been taken, subject to the opinion of the court, judgment was ordered for the defendant; on the ground, as far as this point was involved, that the intestate's relation to the defendant, was rather that of a principal than a co-surety; and that a surety may take himself by contract out of the liability to contribute.(q)

§ 457. But in 1857 all doubts upon this point were conclusively set at rest, as far as the Massachusetts courts are concerned, by the decision of the Supreme Court of that state in the case of *Aldrich v. Ames*, 75. Massachusetts (9 Gray), 76. There the case is stated to have been in substance, "that the plaintiff at the request of the defendant, and for a valuable consideration, became bail for John A. Crehore, upon which the defendant promised the plaintiff to indemnify and save him harmless," and the defence was that the promise, not having been in writing, was within the statute of frauds. Shaw, C. J., said: "The court are of opinion that this ground is wholly untenable. This is a promise by the defendant to another to pay his debt; or, in other words, to save him from the performance of an obligation which might result in a debt. But it is a promise to the debtor to pay his debt, and thereby to relieve him from the payment of it himself, which is not within the statute of frauds. The theory of the statute of frauds is this, that when a third party promises the creditor to pay him a debt due to him from a person named, the effect of such a promise is to become a surety or guarantor only, and shall be manifested by written evidence. The promise in such case is to the creditor, not to the debtor. For instance, if A, a debtor, owes a debt to B, and C promises B, the creditor, to pay it, that is a promise to the creditor to pay the debt of A. But in the

(q) See also *Taylor v. Savage*, 12 Massachusetts, 98, to the same effect.

same case, should C, on good consideration, promise A, the debtor, to pay the debt to B, and indemnify A from the payment; although one of the results is to pay the debt to B, yet it is not a promise to the creditor to pay the debt of another, but a promise to the debtor to pay his debt. This rule appears to us to be well settled as the true construction of the statute, well confirmed by authorities." So the plaintiff had judgment.

§ 458. The Supreme Court of Maine held, in *Smith v. Sayward*, 5 Greenleaf, 504 (A. D. 1829), that the defendants' promise to indemnify the plaintiff for signing, at their request, a note as surety for one Daniel Smith, was not within the statute; Daniel Smith not having requested the plaintiff to become his surety, and the note having been given for a purchase of an interest in lands, made by Daniel, as the agent and for the benefit of the defendants, although the purchase was in Daniel's own name, his agency being secret. But in this case, as in *Harrison v. Savotel*, (which was chiefly relied upon as the authority for the ruling of the court), the opinion dwelt so much upon the benefit to be derived by the defendants from the transaction, as to render somewhat obscure the real ground of the decision. The opinion concluded by saying that "the promise raised upon that consideration was not, as contended by the defendants' counsel, to pay the debt or answer for the default of another; but it was to indemnify and save the plaintiff harmless for performing a beneficial service for them, and at their request; to save him harmless in case he should be compelled, as he has been, to pay their debt contracted by their agent." The case is therefore of but little authority upon either side of the question.

§ 459. In the other States, the ruling upon this question has generally depended upon the time when it was first presented for adjudication; the earlier cases following *Thomas v. Cook*, and *Chapin v. Merrill*; and the more recent cases following *Green v. Cresswell*, and *Kingsley*

v. *Balcome*, which are regarded as having overruled their predecessors.

§ 460. The ablest argument upon principle in support of the doctrine that the promise is not within the statute, which has been made in any case, either in England or America, is to be found in Chief Justice Parker's opinion in *Holmes v. Knights*, 10 New Hampshire, 175, A. D. 1839. There the case was submitted to the court upon a statement of facts, from which it appeared that one Webster was ordered to recognize, with two sureties, for his appearance in a criminal court to answer the charge of passing counterfeit money; and the plaintiff entered into such recognizance with Webster and one other person, upon the defendant's oral application and promise to indemnify him; that Webster did not appear, whereby the recognizance became forfeited and the plaintiff had been compelled to pay, etc. After argument the plaintiff had judgment. Parker, C. J., in delivering the opinion of the court, after laying down the general rule applicable to collateral undertakings, said, that the questions to be examined in this case are, whether Webster was liable to indemnify the plaintiff, and whether the defendant's undertaking was collateral to that liability. He then proceeded: "When one requests another to become surety for him and he does so upon that request, the law raises an implied promise to indemnify. But the case does not find that Webster requested the plaintiff to recognize for him, or that the plaintiff acted upon any such request. From the nature of the case, Webster must have assented that the plaintiff should become his surety; but mere assent, without any request or promise, and where there was a request by a third party, and an express promise by him to indemnify, is not sufficient to raise an implied promise. A declaration in favor of the plaintiff against Webster must have alleged, that he became surety at his request, and on the request the promise to indemnify may be implied. But this case only finds that the defendant applied, and that he promised. If we may

infer that Webster assented, we cannot infer any request by him. Of course we cannot find, nor could a jury on such evidence, any credit given to Webster, or any original liability on his part, to which the defendant's engagement was collateral." (r)

§ 461. "For aught that appears to the contrary," continued the learned Chief Justice, "if Webster made any request, the plaintiff refused." "Webster in that case could not be held liable on the request he made, for that would not have been acted on, but rejected. The whole credit would have been given to the defendant. We do not mean to be understood, however, that the promise of the defendant would be within the statute, had the case stated that Webster also requested the plaintiff to become surety for him. It is apparent that the plaintiff did not assume the liability upon the request of Webster, if one was made; but upon the request of the defendant, and upon his promise to indemnify; and there are authorities showing that a promise to indemnify in such case is not within the statute;" citing and commenting upon *Thomas v. Cook* and *Chapin v. Merrill*. "The promise of the defendant is not to answer for the default of Webster, in not appearing according to the terms of the recognizance. That was the undertaking of the plaintiff in the recognizance itself. Nor is it to answer for the default of Webster, in not indemnifying the plaintiff. It has no reference to any duty on the part of Webster to indemnify the plaintiff, in case he should make default. That duty the defendant took upon himself." The learned Chief Justice concluded his opinion, by saying that under the circumstances, if Webster was also liable on an implied promise, that liability might be held to be an original independent liability. "If either was to be deemed collateral, the liability of Webster in such case would seem in point of fact to be collateral to that of the defendant."

(r) See the same distinction between a request and an assent very neatly taken, and the same consequences deduced therefrom, in *Pearce v. Blgrave* ante, § 163.

§ 462. The question was decided in the same way by the Supreme Court of Georgia in *Jones v. The Administrators of Shorter*, 1 Kelly, 294, A. D. 1846. There the plaintiff filed a bill for specific performance of a verbal agreement by the defendants' intestate, to execute a bond of indemnity, and for the payment by the defendants of any amount, which might be recovered against the plaintiff and the defendants, in an action pending upon an administrator's bond, wherein the plaintiff and the defendants' intestate were sureties for the due performance of his trust by the administrator; alleging that the bond was executed by the plaintiff upon the agreement of the defendants' intestate, to indemnify the plaintiff against any loss in consequence of his so doing; and that after the bond was so executed, he promised to draw up and execute to the plaintiff a written indemnity accordingly. The bill was afterwards amended, by alleging that the plaintiff had paid sundry sums of money upon judgments and other demands, growing out of the administrator's default. The court dismissed the bill, holding, on the authority of *Thomas v. Cook* and *Chapin v. Merrill*, that there was an adequate remedy at law by an action upon the verbal promise. This was an action, it will be noticed, between two of the sureties.

§ 463. And in *Mills v. Brown*, 11 Iowa, 314, A. D. 1860, the defendant interposed, by way of set off, a demand against the plaintiff, arising upon a promise to indemnify him for signing as surety a note with a third person; and it was held, upon the same authorities and the more recent cases which followed them, that the promise was not within the statute. It would appear from the report, that the note showed upon its face that the defendant had executed it as surety for the third person.

§ 464. A similar rule was laid down by the court below in *Doane v. Newman*, 10 Missouri, 69, A. D. 1846, but the point was not argued upon the appeal, and the case went off upon another point.

promise of the defendant to indemnify him for becoming surety, at the defendant's request, for one McDonald, in an undertaking in replevin ; and the Supreme Court affirmed a judgment for the defendant, on the ground that the promise was within the statute. The opinion, delivered by Sutliff, J., first considered the question upon authority, regarding the law as entirely settled in England by the decision in *Green v. Cresswell*, and in New York by that in *Kingsley v. Balcome*, each overruling a former case holding the other way. The opinion then proceeded to discuss the question upon principle ; and concluded that if the authorities left it in doubt, the rule should be settled in the same way. In answer to the argument that McDonald was not liable when the promise of indemnity was made, the learned judge said, that it makes no difference whether A, a principal, has already made a purchase from B and incurred a debt, for which C asks D to become the surety of A, and promises to indemnify him therefor ; or whether A's purchase can only be obtained upon his obtaining such surety, and the debt is contracted and the surety becomes liable, after such a promise of indemnity. "In either case," he proceeded, "the liability assumed by the surety is only to the effect, that the principal shall discharge his own duty, or pay his own debt ; and the principal is bound in law to prevent the liability attaching to the surety ; and if the surety should be compelled to pay the debt or suffer any loss, as his surety, then the principal is in law bound fully to indemnify or remunerate him for the same." And in this opinion the other judges concurred. But the argument, that the liability of the third person arises out of a subsequent payment by the promisee, was either disregarded or misunderstood.

§ 469. In *Kelsey v. Hibbs*, 13 Ohio, New Series, 340, A. D. 1862, a bill of exchange, payable to the order of one Hale, but not indorsed, was handed by the defendant to the plaintiff, with a request to indorse it *for him*, which the plaintiff did ; and the bill was subsequently indorsed

by Hale and negotiated ; but for whose benefit the report does not state. The name of the defendant was not on the bill, and there was nothing else to show that he was liable to the holders for its payment. The plaintiff was compelled to pay the amount of the bill to the holders, and brought this action on a contract, alleged to arise from the circumstances stated, to recover the amount so paid. The defendant relied on the statute of frauds as a defence. And it was held, that the circumstances showed no consideration sufficient to create a distinct and independent contract, which would not be affected by the statute ; but only a promise to indemnify against the default of a third person, which, not being in writing, created no legal obligation. But apart from the question whether an express promise to indemnify is within the statute, this was apparently a case where the promise was only implied ; whereas the statute of Ohio, like the English statute, relates only to special promises ; a feature which the court seems to have entirely overlooked.

§ 470. In Alabama it was also said, in *Brown v. Adams*, 1 Stewart, 51, A. D. 1827, that the defendant's promise of indemnity against any liability to be incurred by the plaintiff, by reason of his executing a bond as security for the due performance of his duty by a public officer, was within the statute ; but no authorities were cited, nor was any reason for the decision given, except that it was "clearly a promise to answer for the default or miscarriage of a third person." The decision is not of much weight, as it was pronounced before the general recognition of the doctrine, that a promise not made to the person entitled to enforce the liability is not within the statute ; and besides, the remark was only a dictum.

§ 471. In North Carolina a verbal promise to indemnify one for becoming surety for another, is regarded as being within the statute, according to a ruling in *Draughan v. Bunting*, 9 Iredell, 10, A. D. 1848. The substance of this case appears to have been, that the defendants' testator

promised to indemnify the plaintiff for indorsing a note for one Underwood, the plaintiff having previously refused to do so, "unless he could be indemnified, which he, Underwood, promised should be done;" and accordingly the promise was given by the testator, in consideration of property transferred by Underwood to him; after which the plaintiff indorsed the note. The court said that the promise was void by the statute of frauds, because Underwood was under a legal liability to indemnify the plaintiff; however a judgment for the defendant was reversed, because the court thought he was liable, by reason of the property placed in his hands by Underwood.

§ 472. The case of *Brush v. Carpenter*, 6 Indiana, 78, A. D. 1854, was in some respects similar to the one last cited; but here the debtor had indemnified the defendant by a transfer of property, made after the plaintiff had suffered damages. The report says that the plaintiff "became replevin bail for one Anderson," upon the request of the defendant, and his verbal promise to indemnify him against loss, etc.; without disclosing whether Anderson also requested the defendant to become his surety, or merely assented to his doing so. The court, without discussing the question, held that it was "well settled by the latest authorities" that the promise was within the statute, citing *Kingsley v. Balcome* and *Green v. Cresswell*. But a judgment for the plaintiff was affirmed, for reasons growing out of the transfer of property to the defendant by Anderson.

§ 473. We will conclude these citations with a case, which turned upon the point, that although it appeared that the plaintiff was a surety for somebody, it did not appear that there was either a third or a fourth person concerned, out of whose relations to the plaintiff the question could arise. In *Beaman v. Russell*, 20 Vermont, 205, A. D. 1848, the action was upon an agreement in writing, whereby the defendant agreed with the plaintiff's intestate, "to indemnify him for signing two notes with J. B., A. R.,

and A. B., for four hundred dollars each," etc. (describing the notes); and upon the trial the plaintiff, having proved the notes, bearing the signatures of the three persons named in the agreement, and also of the plaintiff's intestate, was defeated; partly on the ground that the agreement did not sufficiently express the consideration. But the Supreme Court granted a new trial, for the reason, (as far as the objection arising out of the statute was involved,) that it was of no consequence whether the writing was or was not sufficient; because there was no evidence that the plaintiff's intestate was surety for any person except the defendant himself; and, for aught that appeared, all the makers of the note might have signed it for the accommodation of the defendant, and on his promise of indemnity, as the plaintiff's intestate did. The point, whether the promise would have been within the statute, had it appeared that the plaintiff's intestate was in fact a surety for the other signers, was therefore left undecided; but the court cited with approbation the cases in England, New York, Massachusetts and New Hampshire, in which such a promise was sustained.

§ 474. As the result of the conflict of authority upon this question, nothing can be regarded as definitely settled; except, perhaps, that where the promisor and the promisee are about to unite in an instrument as sureties for the third person, the promise to indemnify is not within the statute. With respect to the weight of argument, the side to which the balance preponderates is even more difficult to discover. If the question was merely whether the general policy of the statute embraces such cases, probably few lawyers would hesitate to answer it in the affirmative. And it is by no means clear that the fifth rule excludes such cases from the language of the statute. But it is more important to have the question definitely settled, than to have it settled in strict accordance with the weight of argument; and the preponderance of authority in favor of the doctrine that such promises are not within the statute, is quite apparent.

§ 475. It is believed that the ruling just referred to, in the case of joint sureties, involves an affirmance of the general doctrine; and that it cannot be restricted within the bounds implied by the rule, that several sureties upon the same instrument may regulate by contract their liability to contribution. For if it will suffice to defend an action for contribution, in favor of the verbal promisor against the promisee; we fail to see upon what principle it will not also suffice, to maintain an action in favor of the promisee against the promisor, to recover the whole amount of damages, which the plaintiff has sustained through a breach of the verbal promise. And no substantial reason is perceived, why the right to maintain such an action should depend merely on the fact, that the plaintiff and the defendant had united in the execution of the same instrument.

§ 476. And it seems to us, that the courts have entirely overlooked another argument, which apparently carries much weight, upon the same side of the question. It is, that in most of the cases where the question has arisen, the defendant would have been liable upon an implied promise to indemnify the plaintiff, if, he had made no express promise. It seems, therefore, unreasonable, inasmuch as a fair question arises upon the terms of the statute, to hold that it requires the safeguard of a writing, in order to prove an express promise; when upon the same facts, an implied promise would arise, which is clearly not embraced within its terms. Again, it is difficult to see upon what grounds, a substantial distinction in principle can be taken, between a promise to indemnify one against a liability, to be thereafter incurred by him, for which a third person is already primarily liable; and a promise to indemnify him against a liability theretofore incurred by him, for which a third person is likewise primarily liable. In either case, the promise is in one sense to answer for the default or miscarriage of another; and of the two descriptions of promises, the second appears to leave room for less doubt than the first, upon the question

whether the third person's liability existed at the time of the promise. But it seems to be conceded, that in the second case the statute does not apply. (*t*)

§ 477. We have, however, given at such length the arguments of the distinguished jurists who have discussed this question, that any further comments on our part appear to be unnecessary. We will only add that the application of the principles upon which the discussion has thus far proceeded, seems to depend in a great measure upon a question, which it leaves enveloped in great obscurity. This relates to the precise point of time when the implied *assumpsit* arises, in cases where the surety enters into the undertaking, without any request on the part of the principal. (*u*)

(*t*) *Westfall v. Parsons*, 16 Barbour, 645; *Myers v. Morse*, 15 Johnson, 425; *Alger v. Scoville*, 67 Massachusetts (1 Gray), 391; *Soule v. Albee*, 31 Vermont, 142; *Mersereau v. Lewis*, 25 Wendell, 243, cited in chapter eleventh, article second.

(*u*) There is very little upon this subject in the text books; and the few opinions, which the elementary writers have ventured to give, are quite as much at variance as the decisions of the courts. Thus in the notes to the sixth American edition of *Smith's Leading Cases*, Volume I, pages 477 and 478, after several cases have been cited, where it was held that the promise was not within the statute, the note proceeds: "But little reflection is requisite, however, to show, that however widely the obligation imposed by an engagement of this nature may differ from that assumed by the principal or surety towards the creditor, it is in all material respects identical with that which subsists between the principal and the surety; and this is sufficient to bring it within the statute, which applies whenever the promise in question is expressly or impliedly conditioned for the fulfilment of the collateral obligation of a third person, and will cease to be binding if the latter is performed." And again, after citing several cases where the promise was held to be within the statute, the annotators add: "Amidst this diversity of decision it may be difficult to discover the true principle, but the result of the authorities, as a whole, seems to be as follows: A promise to indemnify a surety for becoming responsible for the principal, by a stranger to the debt is *prima facie* within the statute, because the principal is bound by an implied obligation to do that which the promisor agrees to do expressly, and the promise is therefore really to answer for the default of the principal. When, however, the promisor is directly or indirectly answerable for the debt, independently of

§ 478. This closes the examination of those cases which are taken out of the statute, because their distinctive features fail to satisfy some particular word or phrase of the sentence, "special promise to answer for the debt, default or miscarriages of another." They constitute the second of the three general divisions, into which we have ranged the cases for the purpose of classification, in pursuance of the plan heretofore marked out.^(v) We shall now proceed to the examination of the third general division, consisting of cases which are taken out of the statute, although apparently within its letter, because they are not regarded as being within its spirit.

the promise, any engagement which he may make that it shall be paid, will be regarded as contracted for himself, and not for the debt or default of another, in the sense in which these terms are used in the statute." On the other hand in the fifth edition of Parsons on Contracts, Volume 3, page 22, note, we find the following: "It has been made a question, whether a promise by A to indemnify B for guarantying a debt due from C to D, is within the statute. It is clear, upon the authorities already cited, that such a promise is not within the statute, as being a promise to answer for the debt of C. For that purpose it must have been made to D, to whom the debt was due.

. The question would seem to depend upon the time when the promise of C, the person for whom the guaranty is given, arises. And this again will depend upon the particular circumstances of the case. If these are such, as to authorize the inference that C made an *actual promise* to indemnify his guarantor, at the time when the undertaking of A was given, or prior thereto, the reasonable presumption is that the promise of A was intended to be collateral. If, on the other hand, there is nothing in the case from which an *actual promise* by C can be inferred, and he can only be made liable on a promise raised by operation of law, from B's having been compelled to pay money on his account, it would seem to be clear that the promise of A must be original. For the promise of C arises upon a subsequent and independent fact, after the promise of A has become a complete and valid contract."

(v) Ante, § 70.

THIRD GENERAL DIVISION.

CASES WHICH ARE NOT WITHIN THIS CLAUSE OF THE STATUTE, ALTHOUGH ALL THE TERMS OF THE STATUTORY DESCRIPTION OF THE PROMISES TO WHICH IT APPLIES, ARE LITERALLY SATISFIED, BECAUSE THEY ARE NOT WITHIN ITS SPIRIT AND INTENT.

§ 479. We have yet to consider, in order to complete the examination of this part of the statute, those cases wherein the promisor undertook to discharge to the promisee a pre-existing liability of a third person; which continued in full force and effect, after the making of the promise. This is the most exact definition which can be framed, of a promise literally within the language of this clause; and the whole scope of the discussion will necessarily be confined to an inquiry respecting the circumstances, under which the statutory requirement that such promises shall be in writing, will be regarded as inapplicable; because the case is not within the spirit and intent of the enactment, however closely it may conform to its letter.

§ 480. There are very many cases, where it was decided that the particular promise before the court was taken out of the statute for this reason; and attempts have been frequently made, to define with precision the rules which govern the application of the principle. But the result has not been very satisfactory. It is readily conceded, that all those cases which, being within the letter, are properly held to be without the spirit of the statute, have this characteristic in common, that the substance of the transaction differed from its form; the essence of the promise having been that the promisor undertook to answer for his own conduct, or for his own debt. But this

form of expression admits of such latitude of application, that it is scarcely any thing more than a paraphrase of the language of the act. When we attempt to reduce it to rules, framed in terms sufficiently definite to be practically useful, we are met at almost every step, by decisions which are in conflict, not only with respect to the terms of the rules which should govern, but frequently upon the question whether a particular state of facts is within or without a general principle admitted to be sound.

§ 481. But we will make the effort to extract from these discordant elements, such principles as appear to be best supported by sound reasoning and the weight of authority; following the plan, adopted in other parts of this work, of giving the cases in opposition to, as well as those in support of the principle, which appears to contain the correct governing rule. By this means, the reader himself will be able to rectify any errors into which we may happen to fall; a contingency which may be of more frequent occurrence than we have ventured to hope; because the circumstances preclude us, in most instances, from resorting to any recognized standard, by which to test the correctness of our own conclusions. We will commence with the first class of this general division, the definition of which, as it was given in framing our classification, (a) is slightly expanded in the title of the following chapter.

(a) See section 71.

CHAPTER FOURTEENTH.

CASES WHERE, AT THE TIME OF THE PROMISE, THE PROMISOR WAS ALREADY LIABLE FOR THE DEBT OR DUTY ASSUMED BY HIM, OR A SIMILAR ONE, IN SOME OTHER FORM, OR TO SOME PERSON OTHER THAN THE PROMISEE; OR WHERE HE HAD PREVIOUSLY BEEN LIABLE THEREFOR, AND HAD BEEN ONLY TECHNICALLY DISCHARGED.

§ 482. The distinguishing feature, which connects in one class the diversified cases embraced in this chapter, is that the promise was not the assumption of a new liability. It related to a liability previously existing, or alleged to exist, against the promisor, which had never been in fact satisfied; but against the enforcement of which, in favor of the promisee, he was entitled to interpose some obstacle. At the same time, there was a third person, who would be discharged by the fulfilment of the promise, upon whom the same liability rested, or was assumed to rest; for which reason, the question arose whether the promise, being general in its terms, was not an undertaking to answer for his debt, default or miscarriage. The ground upon which these cases are taken out of the statute, is that the practical effect of the promise, was merely to remove the obstacle to the enforcement of the promisor's own pre-existing liability. They are governed by the sixth of our general rules, which is as follows:

RULE SIXTH.

A promise is without the statute, if its effect was merely to remove some impediment to the enforcement, by the promisee, of a liability already resting upon the promisor, in the same or some other form; although its fulfilment will necessarily result in the discharge of the precedent liability of a third person to the promisee.

§ 483. The impediment removed by the promise may have been a doubt, existing in law or in fact, respecting

the liability of the promisor for the demand assumed by him ; or it may have been a legal obstacle to the enforcement, by action, of some previous liability, which was of undoubted obligation. In the latter case, the impediment may have been formal ; as where the promisee was equitably the owner of a demand against the promisor, but having derived his title from another person, in whose favor it had originally accrued, he could not have maintained an action at common law, but for the promise ; or it may have been a substantial bar to any action, as where, in consequence of some act or omission of the creditor, the promisor was legally discharged from a previous liability, without any actual satisfaction of the same. Instances where each of these kinds of impediments was removed by the promise, will be given in the course of the different subdivision of this chapter.

ARTICLE I.

Where the promise contained an admission of liability on the part of the promisor as a primary debtor ; but another person was in fact liable, either exclusively or with him, for the same debt or duty.

§ 484. It is now well settled, that where the only objection to an action upon a verbal promise, is that another was already liable, jointly or severally, with the promisor, for the demand assumed by him, the agreement is not within the statute. Still the letter of the enactment covers such a promise ; and at one time a doubt existed whether the case was not within its provisions. Thus in *Stephens v. Squire*, 5 Modern, 205, and Comberbach, 362, A. D. 1696, which has already been cited upon another point(a) an action sounding in tort, had been brought against the defendant and two others ; and the defendant, in consideration that the plaintiff would not further prosecute that action, promised to pay him 10*l.* and costs of suit. In an action upon this promise, the plaintiff having recovered a

(a) Ante, § 130, note.

verdict, the defendant moved for a new trial, on the ground that the promise: "was made in behalf of another and not in writing." "But the court were of opinion, that this cannot be said to be a promise for another person, but for his own debt, and therefore not within the statute."

§ 485. A few other cases directly involving, or to be most satisfactorily explained upon the same principle, are cited in the note; (b) but in these days it is so well understood that it is unnecessary to discuss it at any length. A question of greater difficulty arises, where the promise has been made in consequence of a claim of liability against the promisor; but he alleges, in defence of an action founded upon it, that he was not liable for the original demand; and that some other person, whose discharge will result from the fulfilment of the promise was in fact liable; so that the promise was in reality, only an undertaking to respond for the latter's debt. The rule is however settled, that such an allegation shall not be interposed, for the purpose of avoiding a verbal promise, which admits the existence of an original liability on the part of the promisor. It may be said that the existence of such a liability is one of the implied, if not the express stipulations of the contract, which is accordingly protected by the consideration. Generally the promisor will be estopped from denying his original liability; but the rule extends to cases which fall short of raising a technical estoppel. (c)

(b) *Files v. McLeod*, 14 Alabama, 611 (1848); *Aiken v. Duren*, 2 Nott and McCord (South Carolina), 370 (1820); *Douglass v. Jones*, 3 E. D. Smith (New York), 551 (1854); and see Lord Ellenborough's remarks in *Castling v. Aubert*, 2 East, 325, post, § 581.

(c) However, in *Hollingsworth v. Martin*, 23 Alabama, 591, A. D. 1853, the defendant had admitted his liability for a debt due to the plaintiff, and had verbally promised to pay it, upon a condition, which the plaintiff insisted that he had complied with. But it appearing that it was in fact the debt of another, it was held that the defendant was not liable. The court put its opinion upon the ground that the condition had not been complied with, as well as that the statute applied.

§ 486. This principle is forcibly illustrated and applied in a recent determination of Vice Chancellor Kindersly, in the case of *Orrell v. Coppock*, 26 Law Journal, N. S., Chancery, 269; and 2 Jurist, N. S., 1244, A. D. 1857. There it appeared that Ralph Orrell died leaving a will, whereby he appointed his son Alfred Orrell and four other persons trustees and executors; but Alfred Orrell wishing to purchase a factory, constituting a part of the property, which he could not safely and conveniently do if he was executor and trustee, renounced probate of his father's will, and disclaimed. The remaining trustees proved the will, and proceeded to carry on the testator's business, which was managed by Alfred Orrell. Afterwards complaints of breaches of trust by the trustees, were made by or in behalf of Mrs. Brooks, Alfred Orrell's sister, and one of the cestuis que trust; and she and her husband insisted that Alfred Orrell had managed the estate as one of the trustees, and not as agent of the others; and that he was therefore personally liable. Alfred Orrell denied all participation in, or knowledge of, the matters in dispute; but after some correspondence, a friendly suit was commenced in equity; which was settled by the solicitor for Alfred Orrell writing a letter, in behalf of his client, to the solicitor for Mr. and Mrs. Brooks, agreeing to give Mr. and Mrs. Brooks his promissory note for 3,000*l.*, payable in three years, with interest, "in consideration of and in satisfaction of the alleged losses, Mr. and Mrs. John Brooks have sustained from the acts of the trustees." About a year afterwards Alfred Orrell died, without having given the note; and this action was commenced to settle his estate. The master allowed the claim of Mr. and Mrs. Brooks for the 3000*l.*, and his decision was affirmed by the Vice Chancellor. It was insisted that the letter, for want of expression of the consideration, and by reason of its having been signed by Alfred's solicitor, was not sufficient to take the case out of the statute of frauds; but in answer to that objection the Vice Chancellor said: "That statute does not apply to the case where a party, giving the guaranty, is himself liable to the demand, which he is purporting to

guaranty; it must be exclusively the debt, default or miscarriage of the other, to bring it within the statute; and therefore it appears to me, that in this case, when Mr. Alfred Orrell was incurring this obligation, it was not merely to satisfy the debt of another, but the debt, which it was insisted, rightfully or wrongfully, that he was liable for; and it is clear from the arrangement that none of the losses, except that of Winterbotham, were individual; but that all were liable for those losses, and therefore Alfred Orrell was not only to be himself discharged, but all the others."

§ 487. The same principle was applied to a promise made in settlement of a claim that the promisor's property was liable, in *Fish v. Thomas*, 71 Massachusetts (5 Gray), 45, A. D. 1855. There the plaintiff had furnished materials for building a ship, which had been charged by them to the builder; and they being about to libel the vessel, to enforce a lien against her, to which they insisted they were entitled under the State law, the defendant, who was one of the owners, and the agent for the others, in consideration of their forbearing to do so, orally promised the plaintiffs, that if a libel upon a similar claim, then pending in the Admiralty, should be sustained, he would pay the debt; and in consideration of this promise the plaintiffs refrained till their alleged lien was lost. The Admiralty claim having been sustained, an action was brought upon the promise, and the cause was tried in the Supreme Court and reserved for the opinion of the whole court. As one reason why the defendant's promise was within the statute of frauds, his counsel insisted that the State law gave the plaintiffs no lien, inasmuch as the materials were furnished on the builder's credit; but the court held that the statute did not apply, because this was a promise to pay a debt, for which the defendant's property was responsible, and which was therefore his debt, sub modo; and that he was estopped from denying that the plaintiffs had a lien, as that was the very subject of controversy, which the parties had agreed should abide the judgment of the court in the other cause.

§ 488. A remarkable case in Iowa, depending upon the same principle, is reported under the title of *Tarbell v. Stevens*, 7 Iowa, 163, A. D. 1858. There the question arose upon demurrer to a petition, alleging in substance that the defendants represented themselves to be owners of, and personally liable as stockholders in a certain bank, for the payment of its circulating notes; that they advertised such a representation in a public newspaper, and made it verbally, whereby they gave credit and currency to the notes; that the plaintiff was a holder of certain of such notes; and that he had become so by accepting them as money from other persons, in reliance upon such representation. It appears, from what is said in the opinion of the court, that the defendants' representation also included an express promise to redeem the notes. The principal ground of the demurrer was that the petition showed, that the defendants' promise was not in writing. The court gave judgment for the plaintiff upon the demurrer, remarking that the statute of frauds did not apply, because the defendants' liability was not for the debt of another, but upon an original and independent ground; that is, that by their representations they gave credit, character and currency to the notes; and caused them to be received by the plaintiff and others in business transactions. The opinion then added: "They were bankers in the county, and in the first place represented themselves to be liable for these bills as stockholders. They may have been taken as sole stockholders in the bank, and owners of it. In the second place they advertised that they would redeem the notes at their counter, in said county, which they refused to do, according to the declaration. Thus by their representations of liability, and their proposing to redeem at their counter, they gave credit and currency to the bank bills, and caused them to be accepted as paper money of value." The principle of this case is very correct, if the objection of the want of any definite promisee, ought not to have been fatal to maintaining any action whatever upon the alleged promise. That objection was also overruled by the court, on the ground that

the defendants must be considered as undertaking to every individual who saw their advertisement, or heard their representations. (d)

§ 489. And in *Hoover v. Morris*, 3 Ohio, 56, A. D. 1827, the decision was controlled by a similar principle, although it was presented in the form of a presumption, instead of an estoppel. There the question was whether an offset, interposed by the defendant in the court below, had been properly allowed. In order to sustain it the defendant had offered in evidence a paper signed by the plaintiff, in these words, "I agree that Dr. Morris's" (the defendant's) "account against Samuel Miller, amounting to about \$26, shall be offset and applied on my claims against Dr. Morris now in suit, and that I will pay the same." The plaintiff insisted that the offset was not admissible, on the ground that the writing did not express the consideration, and moved for a new trial, because it had been admitted in the court below; but the motion was denied, the court saying: "It" (the memorandum) "is nothing more than an admission that a stipulated sum of money is due from the plaintiff to the defendant, for which the latter shall have credit. It is not an undertaking to pay the debt of Miller, but an acknowledgment of a pre-existing liability to pay it." "In this view of the case, which we deem the correct one, it is not touched by the statute of frauds."

ARTICLE II.

Where the effect of the promise was to alter the form of a previously existing liability.

§ 490. It is obvious that the question, whether an alteration of a previously existing contract to respond for another, is within or without the statute, generally depends upon the nature and extent of the alteration. If the con-

(d) This case might, perhaps, have been put upon the ground that there was a representation of a fact, as well as a promise; and so that it was within the principle of the cases cited in chapter iv, article ii. And see *Phillipps v. Bateman*, 16 East, 356.

tract was executory, and a new one has been made, varying from the old contract in any essential features, a question at once arises, which will be examined in a subsequent part of this work, whether when an agreement falls within the statute of frauds, any material alteration of its terms must be evidenced by a writing. It will be shown in the proper place, that the courts are not entirely of accord upon this question. But conceding that the statute applies where the alteration is material, it would evidently be a forced construction of its provisions, to hold that every variation of a liability assumed by a contract, no matter how slight it may be, must be regarded as a new contract, and invested with the same formalities as the original agreement. It is quite difficult, however, to draw the dividing line; and the principle must be applied with great caution. But where the contract has been so far executed, that the promisor's liability thereunder has assumed the form of an indebtedness, there seems to be no reason why the statute should apply to any agreement which the parties may see fit to make, not having the effect to increase the liability to respond for another, which the promisor has already incurred.

§ 491. A striking instance of the application of the principle now under examination, may be found in *Macrory v. Scott*, 5 Exchequer, 907, (a) decided in 1850. The action was debt on a judgment; and the defendant pleaded in substance that the judgment was recovered, with the defendant's assent, as surety for Scott Brothers, to secure the payment of moneys due from Scott Brothers to the plaintiff, and to be advanced by the plaintiff to them; and that all of the moneys so due and advanced, for which the judgment was to be security, had been paid. To which the plaintiff replied in substance, that after the recovery of the judgment an agreement was made between the plaintiff, and Scott Brothers, that for the sake of winding up the unsettled transactions between the plaintiff and

(a) S. C., 20 Law Journal, N. S., Exchequer, 90.

Scott Brothers, they should execute to each other releases; that the plaintiff should advance to a certain banking company 800*l.*, guaranteed by him on behalf of Scott Brothers, and to them directly 200*l.*; and that the defendant assented to this, and agreed that the judgment should stand as security for the 1,000*l.* At the trial the plaintiff proved an agreement in writing by the defendant, assenting to another agreement between the plaintiff and Scott Brothers, which was to the effect set forth in the replication; but it was insisted that the agreement signed by the defendant did not sufficiently express the consideration.

§ 492. The plaintiff had a verdict, and a rule nisi was obtained to enter a nonsuit or for a new trial, on the ground that the case was within the statute, and also on a question of variance; and after argument the rule was discharged. Upon the point arising under the statute, three of the barons agreed that the memorandum was sufficient; but Parke, B., also held that the statute did not apply, and Martin, B., put his decision entirely upon that ground. The former said: "It is not directly a promise to pay the debt of another, but an agreement stating that property already pledged for one debt shall remain pledged for another. Although the ultimate effect is that the debt may be paid, yet the immediate object is merely to appropriate the fund in a different manner. It therefore falls within the principle of the decision in *Castling v. Aubert*.(b) It is not necessary however to decide that point, though I feel no doubt upon it." Martin, B., also said: "To my mind this is clearly not a case within the statute of frauds. It is not undertaking to answer for the debt, default or miscarriage of another, but an agreement that a certain existing obligation shall continue." "So that even if it had been a parol contract it would have been perfectly good, as the statute of frauds does not apply."(c)

(b) Post, § 580.

(c) The peculiarity of this case, upon which the remarks of Lord Wensleydale and Baron Martin were doubtless founded, was that the agreement was merely a defeasance or conditional satisfaction of the judgment. For the

§ 493. The case of *Rexford v. Brunell*, 1 New York Legal Observer, 396, decided in the New York Common Pleas in the year 1843, is referable to the same principle. There the question was whether a setoff interposed by the defendant, in an action upon a bill of exchange could be allowed. The setoff arose upon the following facts : The plaintiff was a surety for one Ensworth, for the payment of the rent of a hotel, leased to him by one Swan ; one month after the lease had been made, Ensworth assigned it by deed to the defendant ; and by a memorandum at the foot of the assignment, he agreed to pay the proportionate part of the quarter's rent for the month. The defendant also agreed to indemnify the plaintiff against his suretyship. A dispute arose, at the time of the execution of the papers, respecting the payment of the month's rent mentioned in the memorandum ; and the plaintiff said that it " would be all right, as he would pay it himself ; " but the defendant was subsequently compelled to pay it to Swan. The majority of the court held that under the circumstances, the defendant's indemnity must be construed as applying only to the rent thereafter to accrue ; that with respect to the month's rent, the only question was whether the plaintiff's promise was within the statute of frauds ; and that the promise was not within the statute, on the ground that the plaintiff was already liable to pay the rent to the landlord, and hence he was not undertaking to pay the debt of another, but only his own debt.

§ 494. So in *Spann v. Baltzell*, 1 Florida (Branch), 301, A. D. 1847, the indorser of a promissory note, before the maturity of the note, made an agreement with the holder, whereby the former promised to pay the note at maturity, punctually and without fail, out of his own funds, and the

same reason these remarks are not inconsistent with the doctrine, that the statute will not permit a verbal alteration to be made of a contract, which it requires to be in writing. But the case is *sui generis* ; and it is difficult to extract any principle from it, extending much beyond the same state of facts.

latter promised to receive payment in the circulating notes of a certain bank, which were then depreciated. It was held that the agreement was made upon sufficient consideration, and was not within the statute of frauds. However, the decision was not distinctly placed by the court, as we think it should have been, on the ground that this was a substituted agreement; the defendant being already liable upon the contract in another form.

§ 495. To this class of cases may also be referred *Blount v. Hawkins*, 19 Alabama, 100, A. D. 1851. There the defendant had become surety in a "replevy bond," given by one Lunsford, in order to retain property upon which the plaintiff had levied an attachment against Lunsford; and afterwards, in consideration of the discontinuance of the attachment suit, he agreed with the plaintiff that he would pay the debt. In an action upon that promise, the Supreme Court held that the statute did not apply, and affirmed a judgment for the plaintiff rendered upon a verdict. The general doctrine upon which the opinion of the court was founded, namely, that a promise is not within the statute, when it was founded upon a consideration beneficial to the promisor and injurious to the promisee, is no longer regarded as law; but the particular application made of it will perhaps bring the case within this principle, inasmuch as the dismissal of the attachment suit discharged the defendant from his liability, as surety upon the forthcoming bond.

§ 496. It is hardly necessary to say that a promise will not be taken out of the statute by this principle, unless the former liability rested directly upon the promisor. For instance the fact that he was a member of a corporation, which was liable for the original debt, will not suffice to sustain his verbal undertaking to respond.(d)

(d) *Trustees of Free Schools, etc., v. Flint*, 54 Massachusetts (13 Metcalf), 539; ante, § 55. And see also *Wyman v. Gray*, 7 Harris and Johnson (Md.), 409, and *Rogers v. Waters*, 2 Gill and Johnson (Md.), 64, which are quite in point, although in the latter the sufficiency of the consideration was the question directly involved.

And perhaps the same principle requires that a promise to pay in one right, a debt for which he was already responsible in another right, should be proved by a writing only.(e)

ARTICLE III.

Where the effect of the promise was to waive a legal defence, against an action founded upon a previous engagement of the promisor.

§ 497. It cannot be doubted, although, as far as we have observed, it has never been expressly decided, that a promise to pay a debt originally contracted by the promisor, collaterally with a third person, but barred by the statute of limitations, or by a certificate in bankruptcy, or the like, is not within the fourth section of the statute of frauds; and consequently that it is good without writing,

(e) See *Rann v. Hughes*, 4 Brown's Parliamentary Cases, 27, and 7 Term Reports, 350, note, cited at length, ante, § 10. Two cases have been published, since this work was prepared for the press, involving to some extent the same question. One of them, *Okeson's Appeal*, 59 Pennsylvania, 99, is given in full in § 32. The other is *Cole v. Shurtleff*, 41 Vermont, 311, decided in 1868. There one question was whether a verbal promise made by a husband, during coverture, to pay his wife's debt contracted before coverture, would enable the promisee to interpose the debt as a setoff to a demand in favor of the husband, upon which an action had been commenced after the wife's death. The setoff was rejected in the court below, and the Supreme Court affirmed a judgment in favor of the plaintiff; holding that inasmuch as by the marriage, the plaintiff became jointly liable with his wife for her antenuptial debts, but his liability as husband ceased upon her death, unless it had been enforced by a judgment recovered during the coverture; whereas on the contrary she would continue to be liable after his death; the debt must be regarded as hers, throughout the time of the coverture, as well as before and afterwards. It was therefore said "that it would seem that the promise relied upon, referring to and applicable only to the debt of another, and not being supported by any consideration, nor in writing, was invalid within the statute of frauds." But the decision was also placed upon the ground, that there was no legal consideration for the defendant's general promise, within the principle determined in *Rann v. Hughes*; and the ruling that there was no consideration for the promise, materially affects the value of the case upon the question arising under the statute.

unless a writing has been made necessary to its validity by some other statute.(a) The principle is very familiar, that in all such cases the new promise is in effect not a new contract, but the revival of the original debt; the remedy upon which is regarded as having been suspended by the legal objection to the recovery. This principle, it is believed, will shelter from the operation of the statute, all cases where the promise was to pay a debt, from which

(a) That an oral promise is sufficient to prevent the running of the statute of limitations against a guaranty, when it was made before the debt was barred, was determined in *Gibbons v. McCasland*, 1 Barnewall and Alderson, 690, A. D. 1818. This was an action upon a guaranty, made by the defendant's testator in 1808, whereby he agreed to be answerable for the payment of the price of certain goods, shipped by the plaintiffs to one Span, at a foreign port. The defendant pleaded the statute of limitations, and the plaintiffs replied that the writ was sued out in Michaelmas term, 1817, and that the cause of action accrued within six years before that time. At the trial the plaintiffs proved the guaranty and the shipment of the goods; that the guaranty was exhibited to the testator in November, 1811; that he then said that he remembered it perfectly well, and when he was able it should be arranged; and that the writ had issued within six years from that time. The judge thereupon nonsuited the plaintiffs, on the ground that as the statute of frauds required the contract to be in writing, it was necessary, in order to take it out of the statute of limitations, that the revival of the contract should also be in writing. A rule nisi for setting aside the nonsuit was made absolute. Lord Ellenborough, C. J., said: "It seems to me that the difficulty in this case arises from considering together two statutes, which have no relation to each other. The statute of frauds requires the promise to be in writing; but being once satisfied, as it has been by a writing in this case, it may be dismissed entirely from the consideration of the court; and then the only question will be, whether the statute of limitations has also been satisfied by the acknowledgment here made." Upon this question his Lordship said that the language used was the recognition of an existing liability, and was sufficient to satisfy the statute of limitations, whether the original promise had been in writing or not. Bayley, J., said: "To satisfy the statute of frauds, there must be a promise in writing; and to take the case out of the statute of limitations, there must be a promise within six years. Both these requisites concur in the present case. It is said that the acknowledgment must be in writing; but that is not necessary, for the defendant's liability is fixed by the original promise in writing, and the acknowledgment within six years is only to show that that liability has not been discharged." Abbott and Holroyd, JJ., concurred generally.

the promisor had been discharged by the operation of some rule of law, without an actual release by the creditor, or a satisfaction of the debt. And it would seem that a similar rule ought to govern, in all other cases, where the original contract, without being absolutely void, was voidable at the election of the promisor ; as, for instance, where an agent, or person standing in a similar relation to the promisor, had exceeded his powers in making it. But the authorities are not always clear upon this point.

§ 498. To commence with partnership cases. It has been made a question, whether, if a partner pledges the firm credit without authority, either for his own debt or for that of a third person, under circumstances which would entitle the other partners to interpose the defence, a subsequent promise to pay the debt, by the partners who did not originally assent to the use of the firm name, will fall within the statute. And it was ruled in Kentucky, in the early case (A. D. 1818) of *Wagnon v. Clay*, 1 A. K. Marshall, 257, that a verbal promise to that effect will be insufficient. There the action was brought by Clay upon a joint note, signed in the names of Wagnon, M. Bell and J. Bell ; and it appeared that J. Bell signed the name of M. Bell to the note, as well as his own ; they being copartners, and the note having been given for a debt of Wagnon. It was further proved, that after the note was executed, M. Bell, having been advised that he was not liable for it, promised the plaintiff to pay it. Error having been brought upon a judgment for the plaintiff, the court held that as the note was void as to M. Bell in the first instance, a subsequent verbal promise by him to pay it, was within the statute of frauds ; and that if such promise had been made in writing, the action would necessarily have been upon the writing, and not upon the original note. On a rehearing, however, the judgment was affirmed ; but upon the ground that there was some evidence of authority, on the part of J. Bell, to bind his partner.

§ 499. So in the case of *Taylor v. Hillyer*, 3 Blackford (Indiana), 433, decided in 1834, the Supreme Court reversed a judgment in favor of the plaintiff and granted a new trial, because the judge at the trial refused to give the jury several instructions pertinent to the evidence; among them one to the effect that where a partner had, with the knowledge of the payee, executed a note in the firm name for his individual debt, a subsequent verbal promise of the other partners to pay it was void under the statute. But as the reversal was upon the whole case, and neither of the legal propositions involved in the exception was specifically assigned as the ground of the decision, it is somewhat doubtful whether that particular proposition was approved; or whether the objection was not that the original note was absolutely void against the other defendants; the evidence having tended to show that at the time when it was executed, the firm had been actually dissolved, and the exception having presented that question.

§ 500. It is believed that the doctrine of these cases, that the validity of the promise under the statute is governed by the same rule, as if the new promisor was an entire stranger to the original transaction, is founded upon too narrow a view of the principle upon which his liability depends at common law. For the act of one partner in pledging the credit of the firm is not a nullity; it is merely an excess of power; and the objection is personal to the other partner, and may be waived, so as to render the contract valid ab origine, without any new consideration. Hence it would seem that in all such cases, a new promise is merely a recognition of antecedent liability, and valid although verbal, as being a waiver of the excess of authority assumed by the partner, who had undertaken to bind the firm. (b)

(b) The rule on the subject of a subsequent recognition by the defendant of his partner's previous unauthorized act, is thus stated in Collyer on Partnership, 5th American edition, § 507. "We will conclude this section by observing, what indeed has already appeared from the case of *Ex parte*

§ 501. Upon the same principle it would seem, that where one of the partners has been discharged from a joint debt by the operation of a rule of law, a new promise to pay the debt should be regarded as a mere waiver of his technical defence, and therefore not within the statute of frauds. The rule appears to have been thus laid down in *Rice v. Barry*, 2 Cranch (U. S.) Circuit Court Reports, 447, decided in 1824. There the declaration counted upon a promise of the defendant to pay the amount due to the plaintiff, upon a judgment rendered in his favor against one J. D. B.; which promise was alleged to have been made, in consideration that the plaintiff would discharge the said J. D. B. from the custody of the marshal, who had arrested him under a ca. sa. issued upon the judgment; and in two of the counts it was alleged that the demand upon which the judgment was recovered was originally a partnership debt of the defendant and the said J. D. B. Upon the trial the defendant's counsel objected to proof of a verbal promise; insisting that if it was originally a partnership debt, it had become merged in the judg-

Bonbonus" (8 Vesey, 540), "that if the creditor can show that the firm have adopted, as a joint debt, the debt which was originally several, this is an answer to any charge of collusion against the creditor, and the firm will accordingly be answerable for repayment of the debt. In cases of this nature, subsequent approbation by the firm of the separate act of their copartner, will be equivalent to previous consent; and continued acquiescence on the part of the firm, in a series of separate contracts and engagements, entered into by an individual partner, will be evidence of subsequent approbation, and will be strong to show that the particular partner engaged in these various transactions is in truth the agent of his copartners;" citing *Wheeler v. Rice*, 8 Cushing, 205; *Sweetser v. French*, 2 Cushing, 309; *Gansevoort v. Williams*, 14 Wendell, 139, 140; *Bank of Kentucky v. Brooking*, 2 Littell, 41. "An express assent of the other partners need not be shown; it may be implied from circumstances." *Gansevoort v. Williams*, 14 Wendell, 133; *Noble v. McClintock*, 2 Watts and Sergeant, 152. "The burden of showing such assent is on the separate creditor who takes the partnership security." *Davenport v. Runlett*, 3 N. Hamp., 386; *Weed v. Richardson*, 2 Dev. and Bat., 535; *Pierce v. Pass*, 1 Porter, 232; *Story on Partn.*, § 133; *Dob v. Halsey*, 16 Johns., 34, 38; *Gansevoort v. Williams*, 14 Wendell, 133, 135; *Wilson v. Williams*, id., 146; *Darling v. March*, 22 Maine, 184; *Brewster v. Mott*, 4 Scammon, 378.

ment, and the defendant's promise to pay it must be in writing ; but after argument and deliberation, the court admitted the evidence, in connection with proof that it was originally a joint debt, "being of the opinion that if it were, there was a moral obligation on the defendant to pay it ; and his promise to do so was a promise to pay his own debt, and not the debt of another, within the meaning of the statute of frauds." This case, upon the reason given by the learned judge for admitting the evidence, is directly in point ; but there was in truth another unanswerable reason for holding the promise not to be within the statute, which does not appear to have occurred either to the court or the counsel ; namely, that the arrest and discharge of J. D. B. extinguished the judgment against him.(c)

§ 502. But a ruling directly contrary to that in *Rice v. Barry* was made in *Greenleaf v. Burbank*, 13 New Hampshire, 454, decided A. D. 1849. There the declaration stated, in substance, that the plaintiffs had sold goods to a firm, consisting of one Eastman and the defendant, and had afterwards accepted the note of Eastman for the goods, and discharged and settled the account against the firm ; and Eastman having died, the plaintiffs, after his death, presented the note to the defendant, as surviving partner, and he promised to pay it, but he had failed to do so. Upon the trial the plaintiffs proved the sale and delivery of the goods to Eastman for the firm ; the making of an individual note therefor by Eastman, and the plaintiffs' acceptance thereof ; that before its maturity, the defendant had admitted to the plaintiffs' clerk, that it was given for the use of the firm, and had promised him to pay it ; that after Eastman's death he had repeated that promise ; and that the plaintiffs had delayed presenting it as a claim against Eastman's estate. A verdict having been taken, subject to the opinion of the court, it was held, after argument, that upon the facts set forth in the

(c) See chapter ix, article ii.

declaration, the defendant's liability for the goods sold to the firm terminated, upon the receipt of the note of Eastman, in payment of the firm debt; and that his subsequent promise to pay it was void for want of consideration. The opinion added: "The case, as stated in the declaration, is clearly within the statute of frauds, notwithstanding the averment respecting the origin of the debt." It was then said that the plaintiffs could not avail themselves of their forbearance against the estate of Eastman, because no averment relating thereto was contained in the declaration; that if there had been an allegation that they forbore, in consideration of the defendant's promise, it would have presented a different cause of action; but there was no evidence to sustain it, as the proofs did not show that they forbore for any such reason. But as there was some evidence tending to show that Eastman's note was not in fact received as payment, the verdict was set aside, with leave to the plaintiffs to amend their declaration.

§ 503. Cases where a person, who was once liable as a guarantor, or otherwise collaterally for another, and has been discharged by some act, omission, or neglect of the creditor, (falling short of a voluntary and intentional surrender of the liability,) subsequently renews his engagement to respond for the same debt, depend upon a principle analogous to that which obtains, where one of several partners renews his liability for a partnership debt, after a technical discharge. There is respectable authority for the doctrine, that in such a case the new promise is within the statute; but the rule is believed to be otherwise. For the law looks upon it as an agreement to waive a technical defence against a previously existing liability, rather than a contract to assume a new liability, as a surety for another.

§ 504. The only cases, within our knowledge, in which such a promise was held to be within the statute, are *Peabody v. Harvey*, 4 Connecticut, 119, and *Huntington*

v. *Harvey*, id. 124, decided in 1821. With respect to several other questions which arose, there were some points of difference between these cases, but as far as this question is involved, the facts in both were identical. In each of them it appeared that the defendant had indorsed in blank, a promissory note, not negotiable, made by one Bushnell and payable to Huntington, which the latter had assigned, with the indorsement, to Peabody. By the local law of Connecticut, a guaranty, as this indorsement was construed to be, is discharged; unless demand shall be made of the principal at maturity, and an action at once commenced and prosecuted against him. Peabody had not complied with these requirements; but it was shown that after the defendant had been discharged, in consequence of such laches, Peabody was about to institute an action upon the notes against the maker, when the defendant, in consideration that he would forbear to do so, promised him to pay the notes within a certain period. In these actions the plaintiff relied upon this promise, the second suit being prosecuted in the name of Huntington, the payee, by Peabody. The court held in each of the cases that no recovery could be had upon the promise, on the ground that the defendant, after his discharge, was a stranger to the notes; and whatever promise he might have then made, in relation thereto, must be in writing within the statute of frauds. A verdict having been rendered in each cause for the defendant, under a ruling at the trial to that effect, a motion for a new trial was denied.

§ 505. It is however well settled, that where an indorser of a promissory note or bill of exchange, with full knowledge that he has been discharged by the holder's omission to demand payment at maturity, and give him notice of nonpayment, promises to pay the amount due upon the instrument, he is liable at common law, although his promise was not founded upon any new consideration. And the principle upon which his liability rests, apparently disposes of any objection arising under the statute. In some of the cases, where an action was sustained upon

such a promise, the question whether the statute applied also arose upon the facts, and was necessarily involved, if not expressly alluded to in the decision. This occurred in *Tebbetts v. Dowd*, 23 Wendell (New York), 379, decided A. D. 1840, where the objection was distinctly taken, that a promise made under those circumstances was within the statute; although it was not noticed by the court in the two opinions pronounced. The opinion of Cowen, J., cited upwards of fifty English and American cases in support of the doctrine; and Bronson, J., coincided, "not on the ground that the indorser is bound by the promise, as matter of contract, for it wants consideration; but on the ground that the promise amounts to a waiver of the objection, that the proper steps had not been taken to charge the indorser." The same rule was established in Massachusetts, by the case of *Hopkins v. Liswell*, 12 Massachusetts, 52, A. D. 1815; and in *Sigourney v. Wetherell*, 47 Massachusetts (6 Metcalf), 553, A. D. 1842, it was held that payment by the guarantor of the interest upon a promissory note, made with knowledge that he had been discharged by the laches of the holder, sufficed, as a waiver of the laches, to render him liable.

§ 506. The same principle has been decided in numerous other cases; and in some of them the application of the statute of frauds was considered, in connection with this question. Thus in *The United States Bank v. Southard*, 2 Harrison (New Jersey), 473, A. D. 1840, where the action was against an indorser of a promissory note, upon proof of a promise to pay after dishonor, the objection that the promise was within the statute was distinctly taken. And although the court set aside a verdict for the plaintiff, because the proof did not show that the defendant, at the time he made the promise, knew that payment had not been demanded of the maker, the opinion expressly stated that the objection growing out of the statute was untenable; and that an indorser, by a promise made with full knowledge of his discharge, "places himself in the same condition he would be in, if such demand and notice had

been proved." But in this case the promise was without consideration.

§ 507. The objection, that such a promise is within the statute, was also unsuccessfully taken in the subsequent case of *Ashford v. Robinson*, 8 Iredell (North Carolina), 114, A. D. 1847. There the defendant was the guarantor of a promissory note; who, it was insisted, had been discharged by neglect to prosecute the maker; and he had made a new promise to pay the debt, in consideration of forbearance against the maker. The court, affirming a judgment for the plaintiff, said: that there was no substantial difference between the liability of a guarantor and of an indorser, upon such a promise; and in either case it must be shown that the promise was made with full knowledge of the facts. The case did not, however, call for the expression of any opinion upon this point, as the court held there was no evidence of laches.

§ 508. It may well be doubted, whether the distinction between a waiver and a contract is any thing but verbal, as far as the application of the statute of frauds is involved. If a new promise was made upon a consideration, the decisions require us to call it a contract. But apparently it was a contract to waive a defence, rather than to pay a debt to which the promisor is a stranger.

ARTICLE IV.

Where the promise was to pay the promisor's debt to a transferee thereof, in order to discharge a debt due by the transferor to the promisee.

§ 509. We have already examined the question of the validity, under the statute of frauds and at common law, of a promise, made by a person owing a debt, to pay the same to a transferee thereof; where the consideration of the promise was the simultaneous discharge of the transferor, from a debt due by him to the transferee, in con-

sideration of which the transfer was made.(a) We now come to a question which, in its common law aspect, is but a continuation of the former discussion; but as respects the application of the statute of frauds, its solution depends upon a principle altogether different from that which controls, when the debt of the transferor was extinguished. It is whether a verbal promise of a debtor, to pay his debt to a transferee thereof is valid, where the immediate and direct effect of fulfilment of the promise will be to discharge, in whole or in part, a debt due from the transferor to the transferee; which nevertheless remains in full force and effect after the transfer and after the promise. It would seem to be very clear, that under the statute of frauds such a promise is valid; because the promisor merely undertakes to pay to one person a debt for which he is already liable to another. The fact that the fulfilment of his promise will discharge the debt of his original creditor is wholly immaterial; for that relates only to the disposition of the moneys, to be paid by him in discharge of his own indebtedness.

§ 510. And in the United States, (notwithstanding some cases, chiefly of an early date, to the contrary,) it seems to be reasonably well settled, that a promise by a debtor to pay his debt to any transferee thereof, is valid at common law, if founded upon a valuable consideration, and even if made without consideration. But in England the question is involved in considerable uncertainty. The doctrine that no consideration, except the extinguishment of both of the intermediate debts, will sustain such a promise, either verbal or written, continues, down to the present day, to be reiterated in the dicta of some of the English judges, and apparently to be supported by some

(a) See chapter tenth, article second. In both places we have generally used the word transfer and its derivatives, instead of assignment and its derivatives; because a distinction has sometimes been taken, between a transaction, whereby the equitable title to the demand itself passes from one party to the other, and a mere authority to collect the proceeds.

decisions ; but it is believed to rest upon no solid foundation of principle, and to be irreconcilable with other cases of unquestionable authority.

§ 511. In some of the cases, the question arising under the statute, and that arising upon the common law right to maintain the action, are treated as identical, or at least as depending upon the same legal principles ; and sometimes both are involved in such obscurity, as to lead to the suspicion that the case has been either badly reported, or decided upon an erroneous construction of the transaction between the parties. As the common law question, although very clearly distinguishable from that arising under the statute, generally presents itself at the same time with the latter, and upon the same facts, we will consider it at some length in a note at the conclusion of this chapter ; first citing a few decisions, where the debate arose upon the application of the statute, either alone, or in connection with the right to maintain the action at common law.

§ 512. One of the most obscure and unsatisfactory of the reported cases, is *Lacy v. McNeile*, 4 Dowling and Ryland, 7, decided in the King's Bench, A. D. 1824. This was an action of assumpsit for money had and received. The plaintiffs were creditors of one Goodfellow, who had accepted bills for the amount of his debt to them, which had been dishonored. An action had been commenced upon the bills against Goodfellow, who had been arrested and had put in bail. Afterwards he executed a deed, assigning to the plaintiffs certain moneys due him by the defendants ; and he also gave the plaintiffs a warrant of attorney, upon which a judgment was entered up against him, and the action previously pending was discontinued, and the bail discharged ; but at what precise time this was done is not disclosed in the report. A memorandum was also indorsed upon each bill, to the effect that its payment was "secured" by that assignment. Immediately after the assignment was made, notice

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of it was given to the defendants; and certain conversations took place between the plaintiffs and one of the defendants, the effect of which was one of the points of the case; but the court held that it practically amounted to a promise by the defendants to pay the money to the plaintiffs. Upon the trial the defendants objected that their promise was within the statute of frauds; but the plaintiffs had a verdict.

§ 513. Upon the hearing of a motion to enter a nonsuit, counsel for the defendants insisted, that as Goodfellow's debt was not extinguished, the promise was collateral. But Bayley, J., interrupted him, saying that the case was not distinguishable from *Israel v. Douglas*; (b) and Abbott, C. J., added: "The defendants' debt to Goodfellow was assigned to the plaintiffs, and Goodfellow discharged from all liability to them; then surely the old debt by him was extinguished, and a new one by the defendants created." The argument then proceeded upon the effect of the conversations; at its conclusion, the rule was refused; the per curiam opinion saying, that "the cases cited," (*Israel v. Douglas* is the only one approaching this point,) "show that the undertaking in this case is not within the statute of frauds." The facts of this case, if the reporters have truly stated them, certainly repel the suggestion of the Chief Justice, that Goodfellow was discharged; the whole transaction having been a mere transfer by way of collateral security, followed up by a judgment upon the original debt. And in *Israel v. Douglas*, the consideration did not pass from the plaintiff to the defendants' original creditor, until after the making of the defendants' promise; and then it was money advanced as a loan.

§ 514. The next case, where the application of the statute came in question, was *Wharton v. Walker*, 4 Barne-

(b) 1 H. Blackstone, 239. A full abstract of this case is contained in the note at the end of this chapter.

wall and Cresswell, 163, and 6 Dowling and Ryland, 288, A. D. 1825.(c) There one Lythgoe, being indebted to the plaintiff, gave him an order for the amount of his debt on the defendant, who was his tenant, payable out of the next quarter's rent; which the plaintiff sent to the defendant "but had not any direct communication with him on the subject." When the next quarter's rent became due, the defendant presented it to Lythgoe as a voucher, and the amount thereof was deducted by Lythgoe from the rent, and a receipt in full given by him, the defendant promising him to pay the money to the plaintiff. Upon these facts the plaintiff brought an action for money had and received, and he was nonsuited at the trial, upon the objection that the case was within the statute of frauds. Upon a motion to enter a verdict in the plaintiff's favor, the court held, that the declaration should have been special, but all the judges also said that the action could not be maintained, because the three parties did not concur, and therefore Lythgoe was not discharged. No notice was consequently taken of the objection arising under the statute.

§ 515. But in the same year (A. D. 1825) the same court decided the case of *Hodgson v. Anderson*, 3 Barnewall and Cresswell, 842; and 5 Dowling and Ryland, 735, where both the questions arose; and it was very clearly held that mere forbearance by the plaintiff, without any discharge, constituted a sufficient consideration, for a promise of the defendant to pay to the plaintiff a debt which he owed to the plaintiff's debtor, made at the latter's request. There the plaintiff sued to recover the balance of an account due him; the defendant paid part of the amount into court; and as to the remainder pleaded the general issue, and gave a notice of setoff, for money paid to the Commercial Banking Company of Scotland, by the order of the plaintiff, in pursuance of a previous liability incurred by the defendant at the plaintiff's request. The

(c) Cited also in chapter x, section 329.

statement of the facts is very voluminous, but it is believed that the point is sufficiently presented by what follows. The plaintiff had become indebted to the Commercial Banking Company of Scotland; and the defendant (who was a merchant in Trinidad,) owed him the account for which the action was brought. The plaintiff gave to the bank his promissory note for his debt, at seven months, and, at the same time, as collateral security for its payment, a letter addressed to Anderson and Rhind, the Edinburgh agents of the defendant, directing them to pay to the bank the amount of the note, (describing it,) as soon as they should have funds in their hands belonging to the defendant; adding that he would credit the defendant therefor, "having received his order to this effect." This letter was presented to Anderson and Rhind by the bank, and they verbally promised to pay the amount according to its terms. The plaintiff's note was not paid at maturity; but various collections were made from time to time by the bank, on account of it; and ultimately the plaintiff gave the bank an accepted bill, due in November following, for the balance still unpaid. Meanwhile the plaintiff had endeavored to collect at Trinidad, the debt due him by the defendant, for the benefit of another creditor; and by his authority, the defendant had given the latter an agreement to pay the debt to him, deducting any payment which might have been made in Scotland. The acceptance given to the bank by the plaintiff was not paid; and after its maturity the defendant, (who had previously arrived in Scotland,) was notified by the holder of the writing not to pay the bank; but afterwards, Anderson and Rhind, on receiving from the bank an indemnity, paid to the bank the amount of the acceptance; for which the setoff was claimed.

§ 516. The question, it will be seen, was whether Anderson and Rhind, or in other words the defendant, were bound by the verbal promise to pay the bank, the consideration of it having been, not the discharge of the debt due by the plaintiff, but a mere forbearance upon it. The

plaintiff having recovered a verdict, (disallowing the setoff,) a rule nisi for a new trial was obtained, which, after argument, was made absolute. Bayley, J., who delivered the opinion, held that it was fairly to be inferred from the plaintiff's letter, as well as the other evidence, that the defendant had assented to the transfer to the bank, of the debt owing by him to the plaintiff; and that having once done so, and promised to pay it to the bank, he was not at liberty to withdraw; and the plaintiff could no longer revoke the authority to pay the bank. But although he quoted Buller's rule in *Tatlock v. Harris*,^(d) he made no allusion to the fact that here the plaintiff was not discharged, merely adding: "So in this case, upon payment by Anderson to the company, Hodgson *would be* discharged." Then passing to the question whether the statute of frauds applies, he said that it does not apply; because the promise was not to pay a debt of Hodgson, but his own debt; and it was made upon a valid consideration moving from the bank, to wit, their forbearing to sue the plaintiff.

§ 517. The American authorities, as we have already said, generally coincide with the ruling in the case last cited. Several cases to that effect will be found in the note at the conclusion of this chapter; and it will suffice to cite one in this place, *Phillips v. Gray*, 3 E. D. Smith, 69, decided by the New York Common Pleas in 1854. There the defendant was indebted to one Chittenden, his contractor; and the defendant and Chittenden having together applied to the plaintiff to purchase some lumber, the plaintiff refused to deliver it upon the credit of Chittenden; whereupon the defendant said that he owed Chittenden money enough, and if the plaintiff would deliver the lumber, and procure Chittenden's order as a voucher to him for making the payment, he would pay the money to the plaintiff; and upon this promise the lumber was delivered. A judgment of the Marine Court

(d) See § 326, ante; and the note at the end of this chapter.

in favor of the plaintiff, rendered upon this evidence, was affirmed; the Court of Common Pleas holding that this was not within the statute of frauds, because it was a promise to pay the defendant's own debt; the transaction being in the nature of a transfer to the plaintiff of the defendant's debt to Chittenden, upon a sufficient consideration.

§ 518. The distinction, which the English cases take in this connection, between an ascertained and defined debt, and a demand which may ripen into a debt, upon the happening of a future contingency, appears to have been the turning point of the decision in *The First Baptist Church of Chicago v. Hyde*, 40 Illinois, 150, A. D. 1866. There Hyde, the plaintiff in the court below, had recovered a judgment against one Rosbrook, upon which the church had been garnisheed as a debtor to Rosbrook; and the question was whether any thing was due to Rosbrook by the church, which could be subjected to the garnishee process. It appeared that Rosbrook had made a contract with the church to perform certain labor; that he had entered upon the performance but had not completed it; and an arrangement had been made between him and the church, that the church should employ others to complete the work and pay for it out of the moneys to be paid to him, the residue of the contract price to be paid to Rosbrook. But before the contract was abandoned, Ferry & Son, who were creditors of Rosbrook, presented to the architect who was to certify to the bills, an order from Rosbrook to pay them a certain sum, which was in fact larger than the amount which, upon the subsequent settlement, was found to be due to him; the architect declined to accept or certify the order, because it was then uncertain whether Rosbrook would complete the contract; but he promised to give them a certificate as soon as the amount was payable. Subsequently he made the same promise to Rosbrook, in answer to an application for a certificate in favor of Ferry & Son, and a request that the money coming to him under the contract

should be paid to them. The order was then presented to the proper officers of the church, who declined to accept or pay it without the architect's certificate, but promised to pay it with such certificate. This was the state of the matter, when the garnishee process was served, several months afterwards ; and at a still later period a settlement was made, and the amount payable to Rosbrook under the contract was ascertained. The question being whether the plaintiff or Ferry & Son were entitled to the money, the court below decided it in favor of the plaintiff ; and a judgment was rendered against the church, upon the garnishee process, for the amount so ascertained. Upon appeal the judgment was affirmed. Walker, C. J., who delivered the opinion, after reciting the facts, said that there was no transfer of the debt to Ferry & Son. And, he continued, if what was said by the architect and officers amounted to a promise to pay Ferry & Son the debt due by the church to Rosbrook, it was without consideration, and also void by the statute of frauds, as being a verbal promise to pay Rosbrook's debt to them ; so that the plaintiff in the judgment acquired a legal lien upon the sum due to Rosbrook from the church.(e)

(e) The question, whether an action will lie at common law, upon a promise of a debtor, to pay his debt to a person to whom it has been transferred by the creditor, in consideration of a debt due to the transferee by the transferor, unless, as a part of the transaction, the debt due by the transferor to the transferee was extinguished, has already been adverted to in the tenth chapter ; but it was then passed over ; and it will now be examined in the light of the cases cited in the text of the foregoing article, as well as those contained in chapter x. In the civil law, it seems to be free from any difficulty. This is the third species of novation mentioned in the extract from Pothier contained in the 322d section, namely, that which "takes place by the intervention of a new creditor, where a debtor, for the purpose of being discharged from his original creditor, by the order of that creditor contracts some obligation in favor of a new creditor." The discussion of the validity of this kind of novation, at common law, involves an examination into the question how far the second of the three propositions, which are deduced from Mr. Justice Buller's proposition in *Tatlock v. Harris*, 3 Term Reports, 180, as mentioned in the 326th section, is sustained by the authorities. No doubt at common law there must be some consideration, for the promise of

CHAPTER FIFTEENTH.

CASES WHERE A PROMISE TO PAY A THIRD PERSON'S PRE-EXISTING DEBT IS NOT WITHIN THE STATUTE, BECAUSE IT WAS SUBSTANTIALLY TO BE FULFILLED OUT OF THE MEANS OF THE DEBTOR.

§ 519. We are now to examine those cases constituting the second class of this general division, namely, where the promise was to be fulfilled out of the means of the

the debtor to pay the transferee; but it is believed that sound principle, and adjudicated cases which cannot be disregarded, establish the doctrine that any valuable consideration is sufficient for the purpose. In the first place when the transferee can maintain an action, he founds it upon the promise and not upon the transfer. It is true that Lord Tenterden in *Fairlie v. Denton*, 8 Barnewell and Cresswell, 395, said that this is an exception to the common law rule that a chose in action cannot be assigned, and this dictum has been copied by some of the text writers. Chitty on Contracts, 8th edition, page 569. But it is clear that this is only a form of expression; for the substantial foundation of the action is the defendant's promise, and not the assignment, as will appear from the cases cited in the tenth and in this chapter. See particularly *Lilly v. Hays*, 5 Adolphus and Ellis, 548, cited in the note to § 368, and *Israel v. Douglas*, cited hereinafter. No reason is perceived why this species of promise should require, in order to give it validity, any specific kind of consideration. In the case put by Buller, namely, "Suppose A owes B 100*l*. and B owes C 100*l*.; and the three meet, and it is agreed between them that A shall pay C the 100*l*., B's debt is extinguished, and C may recover that sum against A," it is easy to understand why A's debt to B must be extinguished, (at least sub modo,) before he is liable to pay it to C; but no apparent reason exists why it is necessary that B's debt to C should be extinguished, in order to sustain A's promise to C. To say that otherwise B could revoke his order; or that C might put the money in his pocket twice, is only reasoning in a circle. But it is said that if the debt from A to B is discharged, and at the same time C gives up his claim on B, as the ground upon which B orders A to pay C, then the consideration moves from C. Undoubtedly that is true; but it is equally true that if any other valuable consideration passes from C to A with B's assent, or from C to B with A's assent, all the parties are privies to the consideration. The

debtor.(a) It needs but little argument to show that a promise which in terms binds the promisor, merely to

text writers give no intelligible reason for the contrary opinion. 1 Parsons on Contracts, fifth edition, pages 219, 220; Chitty on Contracts, eighth edition, pages 569, 570; Addison on Contracts, sixth edition, pages 816, 817. The cases are equally unsatisfactory; they go upon the supposition "*ita lex scripta est.*" Secondly, there are several cases where the facts must be utterly perverted to conform them to such a rule, and others where no perversion of the facts will succeed in doing so. In *Israel v. Douglas*, 1 Henry Blackstone, 239, decided in the Common Pleas, in the same year with *Tatlock v. Harris* (1789), an action was sustained in favor of a transferee, upon a promise of the defendants to pay him the debt; the consideration having been money loaned to the transferor (one Delvalle) by the plaintiff, on the faith of the promise. The promise consisted of the defendants' acceptance of an order from Delvalle, to pay to the plaintiffs whatever was due; they having twice refused to accept his order for a definite sum. Lord Loughborough, C. J., in his opinion, said that it was "admitted that the plaintiff has the law with him in some action." Yet it was contended that the suit should have been in the name of Delvalle; but the Chief Justice overruled that point, his reasons being, it is supposed, contained in this extract from a subsequent part of his opinion, generally cited as the authority for maintaining the action in the name of an assignee. "The debt is with the consent of the parties assigned to the plaintiff. Douglas has due notice of it, and assents; by which assent he becomes, with his partner, liable to the plaintiff." "When Douglas had admitted the money to be due, he was that moment estopped, as it were, from saying that the money was not due." All the judges concurred upon the merits; and it is believed that the case has never been questioned upon that ground; although it has been much criticised, because it decided that the plaintiff could recover under a count for money had and received. See *Johnson v. Collinga*, 1 East, 98; *Taylor v. Higgins*, 3 East, 169; Per Bayley, J., in *Wharton v. Walker*, post. In *Liversidge v. Broadbent*, hereinafter cited, Martin, B., said: "In *Israel v. Douglas* there was a consideration to support the promise." In *Wilson v. Coupland*, 5 Barnewall and Alderson, 228, decided in the King's Bench, A. D. 1821, the plaintiffs' debtors, Taillasson & Co., of St. Lucia, "inclosed to the plaintiffs the account current, rendered to them by the defendants, accompanying it with a memorandum at the foot, transferring to the plaintiffs the balance of 768*l.* then due." Nothing was said about a discharge; and the 768*l.* was but part of the debt due from Taillasson & Co. to the plaintiffs. The defendants subsequently promised in writing to pay the plaintiffs in three months; but in the mean time they settled with Taillasson & Co. and procured their receipt in full. The plaintiffs brought

(a) See section 71.

apply to the payment of a third person's debt, the money or property of the debtor in his hands, or thereafter to

this action for money had and received, and at the trial had a verdict. The defendants moved for a rule to enter a nonsuit; upon which motion, their counsel pressed upon the court the argument, that the defendants' agreement was void for want of consideration, because Taillasson & Co. had not been discharged. But the court refused any rule. Nothing was intimated in any of the opinions, to the effect that Taillasson & Co. had been discharged. Abbott, C. J., said that, by consent of all parties, an arrangement was made that the defendants should pay the plaintiffs the debt they owed Taillasson & Co.; and as this was for money had and received, the defendants, by acceding to the arrangement, made themselves liable for money had and received. Bayley, J., said that the bargain between Taillasson & Co. and the plaintiffs, was that the money had and received by the defendants to the use of Taillasson & Co., should be money had and received to the use of the plaintiffs; and that the assent of the defendants thereto made them debtors and liable for money had and received. He added, that the effect of the agreement was to give the defendants three months in which to pay the debt, which was an advantage to them. Holroyd, J., concurred without giving any reasons. Best, J., said that a chose in action was not assignable without consent of all parties; but here all parties had assented, and from the moment of the defendants' assent the 768*l*. became money had and received to the plaintiffs' use. Not only was there no proof of any discharge of Taillasson & Co., but the circumstances repelled such an idea, for the plaintiffs had "a long correspondence" with the defendants, before they procured their promise, and of course had not then discharged their debtors; and it does not appear that after the promise they communicated with the latter in any way. The next case was *Lacy v. McNeile*, 4 Dowling and Ryland, 7, (cited in the text, § 512.) It is impossible to understand the Chief Justice's remark, during the argument of that case, that the debtor was discharged; even the decision in *Warren v. Batchelder*, 16 New Hampshire, 580, (chapter xii, § 400,) will not sustain such a conclusion; for it was expressly in evidence that the assignment was made by way of security for the debt. The next case was *Wharton v. Walker*, 4 Barnewall and Cresswell, 163, and 6 Dowling and Ryland, 288 (also cited in the text, § 514). Here the old doctrine that the debtor's promise to pay the debt to the transferee is without consideration, unless the debt due from the transferor to the plaintiff is discharged, was reiterated in the decision. But the argument turned upon the question of pleading, which was apparently uppermost in the mind of the court and counsel; and the decision can be clearly supported not only on that, but on two other grounds, viz.: first, that there was no consideration whatever for the defendant's promise, at least none moving from the plaintiff; and secondly, that the promise itself was made to Lythgoe, and not to the

come to his hands, if made with the assent of the debtor, is not within the spirit of the statute. Some cases, pre-

plaintiff. The next case was *Hodgson v. Anderson*, decided in the same year and by the same court, and abstracted in full in the text, § 515. This decision should have given the death blow to the doctrine that a discharge of the original debtor is essential to the validity of the transaction. It is true that it can be nominally distinguished from the others, by the circumstance that the bank had already got its money, without the aid of an action; but the decision expressly takes the ground, and necessarily so, that the defendant's *promise* to the bank with the assent of the plaintiff, was binding upon him and upon the plaintiff; being founded upon a valuable consideration, namely, the forbearance given by the bank to its debtor. Suppose the money had not been actually paid; how could the court have held, after this decision, that the bank could not sustain an action, on the ground that the defendant's promise was without consideration? The remark of Bayley, J., to the effect that upon *payment* by the debtor to the transferee, the transferor's debt *would be discharged*, ought to have exploded the whole doctrine that it must be discharged at the time of the *promise* to pay. In *Fairlie v. Denton*, 8 Barnewall and Cresswell, 395, and 2 Manning and Ryland, 353, A. D. 1828, the Court of King's Bench determined that where it did not appear that a defined and ascertained sum was due to a person, drawing an order on his alleged debtor, at the time when the latter promised to pay it, the holder could not enforce the promise. The doubt here arose whether the work had so far progressed, under a contract for building certain houses, which had been entered into between the defendants and the person drawing the order, (whereby the defendants were to pay in certain instalments as the work progressed), that the drawer of the order was entitled to any further instalments. But in *Crowfoot v. Gurney*, 9 Bingham, 372, A. D. 1832, a similar contract had been made between the defendant and a builder who had since become bankrupt; and the work had been completed; but the precise amount payable to the builder could not be ascertained without measurement; thereupon the builder gave an order to one of his creditors upon the defendant, for the payment of whatever was due to him; upon presentation of which the defendant promised the creditor to pay him when the amount should be ascertained. After the measurement was made, but before payment, the builder became bankrupt; and the assignees brought this suit, to recover the sum payable to him by the contract. It was held that they could not recover; because there was an equitable assignment to the creditor, and he had the right to go into equity to compel a formal assignment. Tindal, C. J., said that the creditor appeared to have looked to the defendant alone, and to have abstained from any application to the bankrupt; but the other judges did not mention that circumstance; and Alderson, J., thought the case exactly parallel with *Hodgson v. Anderson*.

senting that precise state of facts, will be presently cited ; and whatever question may arise at common law, respect-

In *Tibbitts v. George*, 5 Adolphus and Ellis, 107, A. D. 1836, Lord Denman, speaking of the equitable interest of an assignee of a chose in action, said (on page 115): "As to express assent, it is undoubtedly held, that in order to give an action at law, the debtor must consent to the agreed transfer of the debt, and that there must be *some* consideration for his promise to pay it to the transferee, but in equity it is otherwise." The correct rule, upon principle, is to be found in the opinion delivered by Martin, B., in the recent case of *Liversidge v. Broadbent*, 4 Hurlstone and Norman, 603, and 28 Law Journal, N. S., Exchequer, 332, decided A. D. 1859. There it appeared that one Clapham, a builder, was indebted to the plaintiff, as acceptor of two bills of exchange, one of which was dishonored, and the other not yet payable, amounting together to 113*l.* 13*s.*; and that Clapham was erecting some cottages at Wetherby, for the defendant under a contract with him, by virtue of which he was entitled to receive about 120*l.* The plaintiff, the defendant and Clapham met, and Clapham signed a document saying, "I hereby agree to authorize" the defendant to pay to the plaintiff 113*l.* 13*s.*, the amount of the acceptances, also other expenses upon the bills and interest, "towards my account for building the cottages, at Wetherby, Mr. Broadbent to debit my account with the above money," and the plaintiff's receipt to be binding between Clapham and the defendant in the contract. The defendant wrote at the foot of this document "Acknowledged, Stephen Broadbent." And this action was brought upon that agreement, the declaration setting it forth specially, and containing also a count for money payable, and upon an account stated. At the trial it was objected that there was no consideration for the defendant's promise, and thereupon the plaintiff was nonsuited; and he afterwards obtained a rule nisi to enter a verdict in his favor. The rule was discharged after argument, all the Barons present delivering opinions. Pollock, C. B., said that the debt due from the defendant to Clapham was not transferred to the plaintiff by the document; and the debt due from Clapham to the plaintiff was not extinguished; he also thought that what the defendant wrote at the foot of the document did not amount to any agreement whatever on his part. Martin, B., said that there are two legal principles which have never been departed from; the first, that at common law a debt cannot be assigned, so as to give the assignee a right to sue for it in his own name, except in the case of a negotiable instrument; and the other that a promise cannot be enforced without a consideration. That assuming that the defendant did promise to pay the money to the plaintiff, there was no consideration for the promise; if the document meant that the debt from Clapham to the defendant was immediately extinguished, there would be a consideration; but here there was only a consent that it should be extinguished, when the money should be paid to the plaintiff.

ing the right of the promisee to maintain an action upon the promise, they seem to command general acquiescence

He added: "No doubt a debtor may, if he thinks fit, promise to pay his debt to a person other than his creditor, and if there is *any consideration* for the promise he is bound to perform it. But here there was none whatever. There was no agreement to give time, or that the debt of Clapham should be extinguished — no indulgence to him or detriment to the plaintiff. There was nothing in the nature of a consideration moving from the plaintiff to the defendant, but a mere promise by the defendant to pay another man's debt." Bramwell, B., doubted whether the Chief Baron was correct in supposing that there was no agreement by the defendant, and put his judgment upon the grounds stated by his brother Martin; namely, that at common law a chose in action is not assignable, and here there was no consideration for the promise to pay Clapham's debt. He quoted approvingly the early authorities, to the effect that the consideration must move from the plaintiff, and that if either the defendant or a stranger derived a benefit from any act done by the plaintiff, at the request of the defendant, it would suffice as a consideration. But "here the plaintiff was under no obligation to do any act, or to forbear or to suffer any inconvenience." Watson, B., said that the first count of the declaration alleged that the plaintiff and Clapham accepted the agreement in discharge of their debts, and the averment was necessary, "for all the cases proceed on the ground that the debt due from the third party to the plaintiff was extinguished, and therefore there was a good consideration moving from him to support the defendant's promise." Here there was no extinguishment of Clapham's debt, and nothing to prevent the plaintiff from suing Clapham. There was therefore a total want of consideration for the defendant's promise. This decision was mentioned approvingly in the subsequent case of *Noble v. The National Discount Company*, 5 Hurlstone and Norman, 225, where it was said by Martin, B., that all the court were anxious to decide the case in favor of the plaintiff, but it did not quite reach the line. But the Common Pleas in the recent case of *Cochrane v. Green*, 9 Common Bench Reports, N. S., 448, A. D. 1860, (S. C., 30 Law Journal, N. S., C. P., 97; 9 Weekly Reporter, 124; 3 Law Times, N. S., 475; 7 Jurist, N. S., 548), adhered to the old ruling. There the defendant pleaded several pleas to a declaration in assumpsit, the seventh and eighth of which were pleaded as partial defences; each of them being to the effect that the plaintiff was indebted to a third person, and the defendant, at the plaintiff's request, agreed with the plaintiff's creditor to pay him the sum due to him, and the creditor "agreed to accept the defendant as his debtor instead of the plaintiff." There was a separate demurrer to each plea; and the court gave judgment thereon for the plaintiff, holding that the creditor had received the defendant's promise only as collateral security, and there was nothing to estop him from suing the plaintiff. But the pleas did not set out any con-

upon the question arising under the statute. And it would seem to be very clear upon principle, that although the letter

sideration whatever, as between the plaintiff and his creditor, nor indeed any valid consideration between the defendant and the creditor. Still most of the reports make the Chief Justice (Erle) and Williams, J., say that nothing short of the plaintiff's discharge would sustain the plea. Of this case it may also be remarked that the facts disclosed by the pleas were much stronger to show a discharge, than those disclosed by the evidence in either *Wilson v. Coupland* or *Lacy v. McNeile*. Some cases in the United States, mostly of an early period, sustain this doctrine; and a recent New York case seems to have proceeded upon the same principle. In *Rupp v. Blanchard*, 34 Barbour, 627 (A. D. 1861), the plaintiff sued to recover a debt contracted by the defendant to the firm of Lawson and Carll; and the facts, as found by a referee, were (briefly) that Lawson and Carll, against whom the plaintiff had recovered a judgment, "made a verbal agreement" with him that they would "turn over and assign" to him the debt due to them by the defendant, to be applied, when collected by the plaintiff, to the payment of the judgment; and at the same time handed to him a bill of items of the account, without any written order or transfer of the debt; which the defendant subsequently promised to pay to the plaintiff, after making certain deductions therefrom. Upon these facts the referee held as matter of law, that the defendant was entitled to judgment; and a judgment in his favor was affirmed upon appeal to the general term of the Supreme Court. The material portion of the opinion is as follows: "Although there may be an assignment of a chose in action by parol, yet to constitute such an assignment, it must be shown that the owner surrendered all control over it, and had made an absolute appropriation of it. And where a debtor agrees to assign to his creditor a claim which he has against another; in order to make it a valid assignment, the creditor must relinquish his claim against the owner of the chose in action. Otherwise the agreement is without consideration, and cannot be construed even into an equitable assignment of the claim." But it was held in two earlier cases in the same State, that an authority, given by a debtor to his creditor, to collect a debt due to him, and apply the proceeds, when collected, to the payment of the debt of the person giving the authority, amounts to an equitable assignment of the first mentioned debt. *Canfield v. Monger*, 12 Johnson, 346; *Taylor v. Bates*, 5 Cowen, 376. But *Ford v. Adams*, 2 Barbour, 349, in the same State, and *Benson v. Walker*, 5 Harrington (Delaware), 110, both decided A. D. 1848, apparently afford some countenance to the doctrine that the intermediate debts must be extinguished, in order to render binding a promise to pay a debt, where there was no actual assignment of it, but merely an order to pay to another. But it is well settled in the United States that a debtor's promise, for a valuable consideration, to pay a debt to a transferee thereof

of the statute might include, its spirit would also exclude all cases, where the promisor and promisee contract with reference to the fulfilment of the promise, either directly or by reimbursing the promisor, out of a similar fund; although the promise might have been couched in the terms of a general undertaking to pay the debt. But there is sufficient conflict in the decisions upon this point, to render it a matter of considerable embarrassment to frame any rule upon the subject, as containing a generally recognized principle of law.

§ 520. This embarrassment is increased by the fact that those cases which admit the general principle to be sound, are not entirely of accord respecting the distinctive terms of the rule in which it should be embodied; and thence arises a discussion, which embraces also the question what is the true rule to be derived from those cases, where a verbal promise to pay the debt of another was sustained, which had for its consideration the surrender of a lien or other security, available to the promisee for the collection of the debt. It has been argued, with no little force, that

is valid, and entitles the latter to maintain an action in his own name; and the weight of American authority is decidedly to the effect, that it is valid without any new consideration. *Compton v. Jones*, 4 Cowen, 13; *Lang v. Fiske*, 2 Fairfield (Maine), 385; *Gordon v. Downey*, 1 Gill (Maryland), 41; *Allstan v. Contee*, 4 Harris and Johnson (Maryland), 351; *Barger v. Collins*, 7 Harris and Johnson (Maryland), 213, 219; *Mount Olivet, etc., Company v. Shubert*, 2 Head (Tennessee), 116; *Jessel v. Williamaburgh Insurance Company*, 3 Hill (New York), 88; *Smith v. Berry*, 18 Maine, 122; *Warren v. Wheeler*, 21 Maine, 484; *Creel v. Bell*, 2 J. J. Marshall (Kentucky), 309; *Matheson v. Crain*, 1 McCord (South Carolina), 219; *Crocker v. Whitney*, 10 Massachusetts, 316; *Mowry v. Todd*, 12 Massachusetts, 281; *Currier v. Hodgdon*, 3 New Hampshire, 82; *Morse v. Bellows*, 7 New Hampshire, 549, 555; *Rollison v. Hope*, 18 Texas, 446; *Moar v. Wright*, 1 Vermont, 57; *Bucklin v. Ward*, 7 Vermont, 195; *Hodges v. Eastman*, 12 Vermont, 358; *Stiles v. Farrar*, 18 Vermont, 444. For a case very similar to *Lilly v. Hays*, where, upon substantially the same facts, it was held that the plaintiff was entitled to recover, both at common law and under the statute of frauds, see *Wyman v. Smith*, 2 Sandford, 331, A. D. 1849, in the New York Superior Court.

they belong to the same class, with the cases where the promise was based upon a fund received from the debtor. But those who maintain that proposition, do not agree respecting the principle which governs the supposed comprehensive class.

§ 521. The conflict of authority upon this subject is well illustrated by two very recent decisions, each proceeding from a tribunal commanding great respect throughout the United States. (b) These two adjudications agree in holding that both these descriptions of cases constitute one class; but they are flatly in contradiction to each other, with respect to the very foundation of the rule which controls it. One entirely repudiates the idea that there is any rule based upon a fund; contending that all rightly determined cases, where such a rule was supposed to control, depended upon the proposition that where the leading object of the promisor was to benefit himself, the promise is not within the statute. The other denies that there is any rule depending on the leading object of the promisor; and holds that all rightly determined cases, where it was supposed to control, depended upon the existence of a fund. On the other hand numerous cases hold that the two classes are distinct; but they are far from being entirely of accord, with respect to the true rule which governs either.

§ 522. It is needless to say, that under such circumstances, the elementary writer would endeavor in vain to ascertain the true rule from precedents merely. Pronouncing, as we are bound to do, an opinion based upon what appears to be the weight of reasoning, as derived from the arguments advanced upon either side, and the weight of authority, as derived from all the adjudications; we reject both the cases in question, and all others to the same effect, as far as they insist that the two classes are

(b) *Furbish v. Goodnow*, 98 Massachusetts, 296, post, § 563, and *Fullam v. Adams*, 37 Vermont, 391, post, § 620.

the same; holding them to be distinct from each other, and that each is governed by its own peculiar rule. That which governs the class now to be examined, is the seventh of our series, namely :

RULE SEVENTH.

A promise to pay the pre-existing debt of a third person to the promisee, is not within the statute, if the substantial effect of its fulfilment will be to discharge the debt, out of a fund furnished to the promisor by the debtor, in contemplation of which the promise was made.

ARTICLE I.

Origin and effect of the rule; English cases recognizing the principle which it embodies.

§ 523. In most of the cases which will be considered in this chapter, the action was founded, either upon a promise made to the creditor, at the time when the fund was delivered to the promisor by the debtor, or upon a subsequent promise to the creditor, without any new consideration proceeding from him. It has been shown in preceding portions of this volume, that as the common law is administered in England, a stranger to the consideration cannot, in general, maintain an action upon a contract; and this doctrine has prevented the foregoing rule from obtaining much recognition in that country. Still it is derived from English cases, the principle of which has been modified, when a modification was required, in accordance with the understanding which prevails in the United States, respecting the creditor's right to enforce such a contract, although the consideration proceeded entirely from the debtor.

§ 524. The principle was very clearly stated, although applied to a debt thereafter to be created; and a question incidentally arising, which we shall hereafter have occasion to examine, was correctly disposed of, in a *nisi prius* case before Lord Ellenborough, *Ardern v. Rowney*, § Espinasse, 254, A. D. 1804. There one Alder had applied to the plaintiff to discount a check for 100*l.* drawn by Alder upon the defendant, but before advancing the money the plaintiff sent his clerk to the defendant to know if the check would be honored, and the latter said that it would

be honored, as he was in Alder's debt 200*l.*; the clerk then said that as the check was post dated, it could not be recovered, and the defendant answered that did not signify, and it should be paid; whereupon the plaintiff advanced the money. At the trial it was admitted that the plaintiff could not recover upon the check; and the defendant objected that he could not recover upon the parol request to advance the money, and promise to repay it; as the promise was within the statute. But Lord Ellenborough, C. J., said that if it was an agreement to pay the amount of any money which the plaintiff might advance to Alder, the case would be within the statute; but it appeared to him that this was an appropriation of part of the money which the defendant said he owed Alder, and that the plaintiff could recover. It was then suggested by the defendant's counsel, that the plaintiff could not recover beyond the money actually due to Alder by the defendant, and he offered to show that the defendant was mistaken in saying that it was 200*l.*; to which Lord Ellenborough assented; and evidence was accordingly produced to show that the real balance was 80*l.*, for which sum the plaintiff had a verdict.

§ 525. The same principle would have very satisfactorily disposed of a more recent case, where the court nevertheless ignored it, and put the decision upon a more questionable ground. In *Dixon v. Hatfield*, 10 Moore, 42, A. D. 1825, the plaintiffs sued as assignees in bankruptcy of one Moore, upon a written agreement of the defendant, to the effect that he would pay Moore 50*l.* for timber to a certain house, "out of the money that I have to pay William West, provided West's work is completed;" and it appeared at the trial, that West had undertaken to complete the carpenter's work on the house for the defendant, and find all the materials; but being unable, for want of funds, to procure timber, it was furnished by Moore upon the defendant's signing the agreement. The jury having found a verdict for the plaintiff, the defendant moved for a rule nisi to set aside the verdict, because the

agreement did not express the consideration ; but the court refused any rule. Opinions were delivered seriatim by all the judges ; but the decision was placed upon the ground that it was a purchase of the property by the defendant, no credit having been given to West, and consequently that West was not liable.(a) But it may be doubted whether the verdict could have been sustained on that ground, as it is hardly to be supposed that the plaintiff intended to lose his property altogether, in case West did not complete the work ; and nothing appears to have been left to the jury upon the question whether any credit was given to West. The fact that the defendant agreed to pay out of the moneys due to West was entirely disregarded ; and the condition annexed to the promise was treated by the court as a mere limitation of the period of the credit.

§ 526. That a promise in terms to apply a fund thereafter to be received from the debtor, to the discharge of a debt incurred on the faith thereof is not within the statute, was settled by the judgment of the court of Exchequer in *Andrews v. Smith*, 2 Crompton, Meeson and Roscoe, 627, A. D. 1835.(b) There the declaration stated in substance that one Hill was employed to do work on certain houses ; and the defendant was employed as surveyor over him, and, as such, was to receive and pay over to Hill the moneys to be paid to him for his work ; and the defendant undertook, in consideration that the plaintiff would furnish to Hill materials for the work, to pay him "out of such moneys, received by the defendant, as aforesaid, as should become due to the said J. Hill," if he would procure an order from Hill for that purpose ; that he did procure and present such an order and furnish materials ; and that the defendant afterwards had funds with which to

· (a) This was the view taken by Park and Gaselee, J. J., and apparently concurred in by Best, C. J., of the question arising under the statute ; but Gaselee, J., also thought that the defendant would have been liable, if credit had been given to West. Burrough, J., gave no special reason for concurrence. The case is very imperfectly reported in 2 Bingham, 439.

(b) S. C., 1 Gale, 335 ; Tyrwhitt and Granger, 173.

pay the same, but, etc. To which the defendant pleaded, with other matters, that there was no writing, etc., and the plaintiff demurred to the plea. Judgment was rendered for the plaintiff on the demurrer, on the ground that it did not appear that Hill became liable to the plaintiff; and also on the principle above mentioned. Upon that point Lord Abinger, C. B., remarked that if the defendant contracted, not to pay Hill's debt out of his own funds, but only faithfully to apply Hill's funds for that purpose, when they should come to his hands, that contract would not be within the operation of the statute. Parke, B., also delivered an opinion concurring on both points; and with them the other barons concurred generally.(c)

§ 527. In all the preceding cases the promise was to pay a debt, to be thereafter contracted by the third person upon the faith thereof. The principle is precisely the same, where the promise was to pay a debt theretofore contracted; but it does not seem to have been recognized in England, when cases presenting that feature have been before the courts. Those where the promisor received moneys from the debtor, to be paid to the creditor; and those where he undertook to pay to the promisee a debt due by himself to the third person, in discharge of a debt due by the third person to the promisee, have been made to depend, as far as the statute was in question, upon a different principle; and have been fully examined heretofore.(d) The door is entirely closed in England by the doctrine already mentioned, to the recognition of another class of cases, which, in the United States, is quite large, and depends entirely upon this principle; namely, where a tripartite agreement was made, whereby the promisor, in consideration of a fund then placed in his hands by the debtor, undertook with the creditor to pay the debt.

§ 528. But in the series of important English decisions, which we shall have occasion to cite, in examining the origin

(c) And see *Hodgson v. Anderson*, cited ante, §§ 515, 516.

(d) Chapter fourteenth, article fourth.

of the next succeeding rule,(e) there are some, where the result might well have been made to depend exclusively upon the principle now under consideration. In the process of settlement of the principle, upon which it was ultimately ruled that they depended, reasons were frequently assigned by different judges for holding that the particular promises were not within the statute, bearing a close analogy to the proposition embodied in our seventh rule. The doctrine stated in some of those cases, that where a person has received property subject to a prior lien in favor of the creditor, a promise to pay the debt, in consideration of the waiver of that lien, is not within the statute, because the promisor was the holder of a fund charged with an incumbrance existing in favor of the promisee, is in reality, with the exception of the statement of the consideration, one of the corollaries derived from this rule. And it is believed that the nature of the consideration is not an essential fact upon which the principle depends. But in the references there made to the property, as a fund from which to pay the debt, it was generally regarded as having proceeded from the creditor, through the process of waiving his lien. This inference involved so much straining of the palpable facts, in order to accommodate them to a legal theory, that it failed to survive the test of time; and in England, the various, and sometimes inconsistent propositions advanced in those cases, have apparently become crystallized into the doctrine, that the promise is valid, because the previous liability of the promisor's property is equivalent, for the purposes of the statute, to a previous personal liability on his part for the debt.

§ 529. The cases to which we allude are so fully abstracted in the next succeeding chapter, with reference to this question, as well as the one there discussed, that it will be unnecessary, in this connection, to dwell at any length upon this feature of them. An examination of

(e) Chapter sixteenth, article first.

them will shed considerable light, not only upon the general principle now under discussion, but also upon some subordinate, but important questions which attend its application. Chief among these is one, which will be made the subject of a separate article of this chapter; namely, whether the promisee can recover damages for a breach of the promise, exceeding the amount of the fund, if it should prove to be insufficient to pay the debt. (*f*)

§ 530. It remains only to add, before proceeding to the examination of the American cases, that it is not necessary, for the purpose of satisfying this rule, that the fund should be applicable to the discharge of the debt, in the same form in which the promisor received it from the debtor. On the contrary, in most of the cases, the transaction between the debtor and the promisor assumed the form of a sale, or other transfer of property, by the former to the latter; upon the agreement that the transferee would pay to the creditor, in discharge of the debt, or otherwise apply to the use of the transferor, the whole or some part of the consideration of the transfer. The distinction between cases of this character, and those where the promise was to pay to the creditor a debt due by the promisor to the debtor, although apparently narrow, is very clearly defined. For in this class of cases the promisor did not become, (at least not until a breach of his contract,) the debtor of the transferor; inasmuch as the promise was to apply the consideration, in the particular manner pointed out by the agreement between them. Evidently the practical effect of the transaction is the same, as if so much money of the debtor had been placed in the hands of the promisor; and accordingly the consideration is very properly treated as a fund in his hands.

(*f*) See article iv.

ARTICLE II.

Where the promisor, having the fund in hand, undertook to pay a debt due to the promisee from the person who furnished the fund.

§ 531.. When the fund was placed in the hands of the promisor, for the express purpose of paying therewith a debt due to the promisee by the person from whom it proceeded, the case frequently presents some feature, which determines the validity of the promise, at common law and under the statute of frauds, without resorting to the principle now under examination. Hence many of those cases have been incidentally considered under some of the former divisions of our subject. Of those which remain to be considered in this connection, some are cases where the promisor, the promisee and the creditor were parties to the contract. They will be examined, with others possessing that feature, under the next succeeding article. Those cases where the creditor seeks to enforce a trust, strictly so called, also fall within this principle; but they demand only a passing notice. It is well settled that the statute of frauds has no application to the duty or implied promise of an assignee for the benefit of creditors, faithfully to administer the fund and to pay over its proceeds, in accordance with the terms of the trust; although the effect of his doing so is to discharge, in whole or in part, the debts of the assignor. This principle was stated, and some of the authorities which sustain it were cited, in a previous chapter.(a)

§ 532. So where an express promise was made to the creditor, founded upon the duty or implied obligation of the assignee, as in *Merrill v. Englesby*, 28 Vermont, 150, A. D. 1855. This was a contest between the unsecured creditors of an insolvent debtor, and certain sureties of the insolvent, together with an assignee, to whom property, which the plaintiff attempted to reach by a trustee process, had been conveyed by the insolvent for their protection.

(a) See ante, note to § 101.

And upon the question, whether the assignment had been sufficiently ratified, before the service of the trustee process upon the assignee, it was held that an express promise, without any new consideration, made by the assignee to the sureties, to the effect that he would keep the property for their security, was valid without writing.

§ 533. But questions of difficulty, upon which the cases are somewhat in conflict, arise when there was no specific trust in favor of the plaintiff; but he founds his action upon an express promise to pay the debt, made by a person holding a fund proceeding from his debtor. In such a case, it would seem upon principle, although some authorities hold otherwise, that in order to sustain the promise at common law, it must be founded upon some new and distinct consideration. It is impossible to reconcile all the decisions upon the subject of the application of the statute to such a promise; but it is believed that the weight of reason and authority sustain the three propositions which follow: 1. That where the promisor absolutely controls the fund, but his application thereof to the payment of the debt due to the promisee, will acquit him of a duty, which he owed to the person who furnished it, the promise is not within the statute. 2. That where he controls the fund, but there is nothing to show that he owes any duty of which he will be acquitted by paying the promisee, the promise is merely to pay the debt of a third person out of a particular portion of his own property, and it is consequently within the statute. 3. That where he does not absolutely control the fund, the promise is within the statute, because there is nothing to show that its fulfilment will not result in paying the debt of a third person out of his own means.

§ 534. To commence with the cases maintaining the first of these propositions. In *Madden v. McCray*, 1 McCord (South Carolina), 486, A. D. 1821, the defendant's brother, who was out of the State, was indebted to the plaintiff; and the plaintiff applied, through an agent, to the defend-

ant for payment; saying that he would attach if payment was not made. Thereupon the defendant said to the plaintiff's agent, that he had effects which had been placed in his hands by his brother to make himself safe as his surety, and also for the payment of his (the brother's) debts; and if the plaintiff would wait until fall, he (the defendant) would pay the debt. Upon this promise the plaintiff "declined" taking out an attachment. It was objected that the promise was within the statute, but the plaintiff had judgment; and the judgment was affirmed upon appeal, on the ground, that as the defendant possessed a fund applicable to the payment of the debt, whether it was specially designed for payment of the plaintiff's debt or not, his promise was obligatory upon him. (b)

§ 535. The same principle, although the case is somewhat obscure, apparently controlled the decision of *Clark v. Hall*, 6 Halsted (New Jersey), 78, A. D. 1829. There the plaintiff and the defendants had conflicting claims upon a quantity of hats, belonging to a person who was debtor to both of them, the plaintiff having the earlier order for the delivery of the hats to him, and the defendants having taken possession of them, under a bill of sale of a later date; the precise purpose of the order and bill of sale not appearing in the case, except that each was given to enable the party receiving the same to effect payment of his demand. Under the supposition, on the part of both parties, that the value of the hats exceeded the amount of both the debts, a verbal agreement was made between them, that the defendants should sell them, and that the parties should share the proceeds equally, until the plaintiff's claim, which was the smaller of the two,

(b) The judge who delivered the opinion of the appellate court was the same before whom the cause was tried; and he said that it appeared in his notes, that the defendant acknowledged that the fund was placed in his hands for the purpose of paying the plaintiff; but the "brief" (bill of exceptions) expressly stated, that he "did not say that he had effects to pay this debt."

should be paid ; but although the hats sold for twice the amount of the plaintiff's demand, they did not sell for enough to pay both the debts. The plaintiff brought this action to recover the amount of his demand, and at the trial he succeeded, notwithstanding the defendants' objection that the promise was within the statute. Upon certiorari the judgment was affirmed, the court merely saying, that in their opinion "the undertaking of the defendants below was not within the statute of frauds."

§ 536. So in *Russell v. Babcock*, 14 Maine, 138, A. D. 1836, the plaintiffs had recovered judgment against one Sprague, and the defendant said to them that he was to pay the judgment, and would pay it if the plaintiffs would withhold the execution. Afterwards he repeated the promise several times, but finally, upwards of a year after the judgment was recovered, he said that he would not pay the whole of it. The plaintiffs, upon the faith of the defendant's promise, had forborne execution during the whole period, and now commenced this action ; and after its commencement, the defendant said that he should lose nothing, as Sprague had secured him, but had directed him not to pay the whole. The court held that the promise was an original one, without assigning the reasons for its conclusion upon that point. This case has been supposed to hold that the forbearance alone sufficed to take the promise out of the statute, and the head note of the reporter is to that effect.

§ 537. But in *Hilton v. Dinsmore*, 21 Maine, 410, A. D. 1842, the court said that *Russell v. Babcock* was decided upon the same grounds, which controlled the decision then pronounced. There it was shown at the trial that the plaintiff held notes against one Dryden, and the defendant sent him word that "Dryden had put property in his hands, wherewith he could help him to his pay, and that he would do it, if he would not sue the notes ;" to which the plaintiff answered, agreeing "to be easy." The plaintiff was nonsuited at the trial ; but the Supreme

Court granted a new trial, saying that if *Russell v. Babcock* was decided upon the ground that the forbearance sufficed to take the promise out of the statute, it was not law ; but there, as well as in this case, there was evidence from which the jury might have inferred, that a fund had been placed in the defendant's hands by the debtor, "with a view to the payment of this debt;" and such a consideration, together with the promise on the part of the plaintiff to forbear, would suffice to support the action.

§ 538. In *Robinson v. Gilman*, 43 New Hampshire, 485, A. D. 1862, the question arose upon a setoff to the demand of the plaintiff, who sued as administratrix, the defendants being also sued as administrators. It appeared that the plaintiff's intestate had had large dealings with one Rollins, who had failed, claiming that the plaintiff's intestate owed him a large sum of money, which the latter denied ; and two of Rollins's creditors had taken out trustee process against the plaintiff's intestate, whereon he had been examined at length respecting his transactions with Rollins, and was unwilling to answer further. The defendants' intestate was a creditor of Rollins, and proposed to take out a similar process against the plaintiff's intestate ; thereupon a conversation took place between the plaintiff's intestate, and the person then acting as attorney for the defendants' intestate, the purport of which was rather vague ; but the Supreme Court held that the jury might have found, that it was to the effect, that in consideration that no trustee process should be taken out against him, the plaintiff's intestate promised that he would pay the debt. The judge at the trial ruled that the evidence did not sustain the setoff, because of a variance and because of the statute of frauds ; and accordingly he directed a verdict for the plaintiff for the full amount of her demand.

§ 539. A new trial was granted by the Supreme Court upon an exception to this ruling, Bell, C. J., delivering a very able and instructive opinion, from which we have

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§ 539. A new trial was granted by the Supreme Court upon an exception to this ruling, Bell, C. J., delivering a very able and instructive opinion, from which we have

had occasion previously to quote.^(c) Upon the precise question now under examination, the learned Chief Justice summed up his conclusions as follows: "He" (Robinson) "was assumed by Gilman to have in his hands property or funds, for which he might be charged as the trustee of Rollins. If he had such funds or property, and of sufficient amount to pay Gilman's debt, the waiver by Gilman of his right to commence a trustee suit would form such a consideration for his promise, as would make it valid without writing, according to the principles adopted by the authorities. The promise to pay the debt was an admission, or might be regarded as an admission by the jury, that he had property for which he might be chargeable to the amount of these notes, as was held in *Jackson v. Rayner*, 12 Johnson, 291."^(d)

§ 540. To these we add a case where the defendant's promise was held to be valid, without any new consideration, under the peculiar circumstances attending his receipt of the fund. In *Shaver v. Adams*, 10 Iredell (North Carolina), 13, A. D. 1848, the defendants and one B. entered into a copartnership to run a line of stages, and B. put into the common stock, at a specified price, a wagon which he had purchased from the plaintiff for the use of the firm, and for which he had given his individual note; then B. sold out his interest to the defendants. It did not appear that there was any express agreement that they should pay the note; although in the settlement of their accounts, he informed them that the note was outstanding, and for that reason he was not entitled to any credit for the wagon; to which the defendants assented, and the wagon was left in the common stock and worn out in the defendants' service. Subsequently the defendants promised to the plaintiff to pay the note, and it was surrendered by the plaintiff to B. A judgment for the plaintiff upon a verdict was affirmed on appeal. The court held that it was

(c) See § 184, and note to § 65.

(d) See this case in § 545, post.

unnecessary to inquire, whether the defendants would be liable upon the contract of purchase; that their opinion was "founded upon the agreement made by the parties to take the wagon and pay the plaintiff for it," and consequently "the contract on which the action is brought," was an original contract not within the statute, founded upon a sufficient consideration.

§ 541. These cases maintain very clearly and satisfactorily the first of the three propositions which we have indicated as tests of the validity of the promise, and it is believed that those which proceed on the contrary principle, were not correctly decided. Such an error, it is thought, was committed upon this point in *Emerick v. Sanders*, 1 Wisconsin, 77, A. D. 1853; although the decision might perhaps have been supported, had it been put upon the ground that the promise was not obligatory at common law, for want of consideration; and upon the proposition that there was no privity between the parties, the case is an authority upon one side of the disputed question thence arising.^(e) There the evidence at the trial was to the effect that the defendant's son had placed property in her hands for the purpose of paying his debts, and particularly the debt which he owed to the plaintiff; and had then left the country. Afterwards she promised the plaintiff, without any new consideration, to pay him the amount of the debt which the son owed him; saying that the latter had left plenty of property in her hands, with which to pay his debts, or this debt. The plaintiff had a verdict in the court below, but the Supreme Court reversed the judgment rendered thereon; holding that the promise was within the statute; because, whether the defendant received the goods as a bailee, or as a purchaser upon a promise to pay for them, there was no privity between herself and the plaintiff; and any subsequent promise to the plaintiff, without the concurrence of the original debtor, was necessarily collateral to his indebtedness.

(e) See chapter twelfth, section 426.

§ 542. The case of *Johnson v. Morris*, 21 Georgia, 238, A. D. 1857, also contains a ruling in conflict with this principle; although the decision might be supported, on the ground that there was no consideration for the defendant's promise to the plaintiff. There the action was brought to recover a balance of account for the hire of a negro; and the evidence tended to show that one Jones hired the negro from the plaintiff for one year at a specified price; that soon afterwards he transferred the negro to the defendant, who agreed with him to pay the plaintiff; and that the defendant afterwards agreed with the plaintiff, to pay him; and paid part of the stipulated price. At the trial in the court below, the jury found a verdict for the plaintiff, under the instructions of the judge; but the judgment was reversed by the Supreme Court upon a writ of error. It is to be inferred from the report that the only questions raised at the trial, and argued before the Supreme Court, related to the competency of certain testimony offered to impeach a witness, and to the terms of the contract between the parties to this suit. The Supreme Court declined to pass upon either question, saying, with respect to the construction of the contract, "Let it be either way, it was a parol understanding to pay the debt of another, and therefore void. Let Morris sue Jones; and Jones, Johnson; and if the latter" (sic) "be insolvent, Johnson can be garnisheed."

§ 543. In *Westheimer v. Peacock*, 2 Iowa, 528, A. D. 1856, there was no proof of the existence of any fund, and the case may be well supported on that ground, although the distinction was not clearly taken in the opinion. There it appeared upon the trial that the plaintiff's assignors, before the assignment to the plaintiff, were about to commence an action against the defendant's son upon a note made by him, and to attach his property therein; when the defendant requested them to forbear, saying "that he was getting his son's property into his hands, and that he would pay the note." The promisees forbore accordingly, and in consequence thereof the debt

was lost; but the report says that there was nothing to show, that the defendant did get his son's property into his hands. The plaintiff had a verdict; and a judgment thereon was reversed on appeal, the Supreme Court holding that the promise was within the statute; it being, in their opinion, a common contract of guaranty, made upon the consideration of forbearance to the original debtor.

§ 544. The case of *Simpson v. Patten*, 4 Johnson, 422, decided A. D. 1809, which has frequently been cited as an authority against the validity of any verbal promise to pay a creditor, founded upon a fund proceeding from the debtor, is distinguishable from those previously cited, and comes within either the second or the third proposition. It was brought before the New York Supreme Court by a certiorari to a justice's court. In the court below, the declaration counted upon a promise of the defendant, that if the plaintiff would forbear to sue one J. S., the defendant would pay the plaintiff the amount of the note of J. S. to the plaintiff, which was then due, "as soon as he could sell an acre of land belonging to the said J. S. which he was authorized to sell," and which the declaration further averred that he had sold. Evidence of a verbal agreement to that effect, having been admitted in the court below, the Supreme Court reversed a judgment for the plaintiff, holding that the promise was within the statute of frauds. The case is meagerly reported, and no reason was given for the decision, except that the promise was to pay a third person's debt; but it did not appear what was the nature of the authority of the defendant to sell the property, or whether he controlled the proceeds after the sale. Still it must be acknowledged that the evidence ran very close to that, upon which, in the other cases, the court permitted the jury to infer that the defendant controlled the fund, subject to a trust to pay the debt of the person who furnished it.

§ 545. But *Jackson v. Rayner*, 12 Johnson, 291, A. D. 1815, in the same court, admits of no distinction, which

will reconcile it with the others ; and it must be regarded as having been overruled by later decisions ; and perhaps as having proceeded upon an erroneous view of the preceding case. This was also an action which came into the Supreme Court on certiorari to a justice's court. It appeared from the testimony in the court below, that the plaintiff had commenced an action by warrant against Michael Jackson, the defendant's son, upon a note ; and when the constable was about to serve the warrant, the defendant told him not to serve it, as he would pay the debt if it was an honest one ; upon which the plaintiff withdrew the suit. Soon afterwards the defendant saw the constable again, and requested him to tell the plaintiff "to give himself no further trouble about it, for he would pay the debt, as he had taken his son Michael's property, and meant to pay his honest debts." Upon this evidence, the justice gave judgment for the plaintiff, overruling the defendant's objection that the promise was within the statute of frauds. The opinion of the Supreme Court was as follows : "The fair construction of the parol proof in this case is, that the defendant below had received an assignment of his son's property, in trust for the payment of his son's debts ; and from that fund he promised to pay the debt now in question. He is to be regarded as a trustee for the creditors of his son, and his absolute promise to this creditor, is evidence that the fund was adequate. But the original debt of the son was still subsisting ; and according to the decision in the case of *Simpson v. Patten* and the authorities there cited, it seems well settled, that a promise to pay the debt of a third person must be in writing, notwithstanding it is made on a sufficient consideration. The judgment must therefore be reversed." (f)

(f) See the later New York cases in the next article. In *Barker v. Bucklin*, 2 Denio, 45, Jewett, J., commenting upon *Simpson v. Patten*, approves it, on the ground that the defendant had not sold the land or received the proceeds, when he made the promise ; but, as the promise was expressly conditioned upon his thereafter selling the property, the force of part of this criticism is not apparent. However it is true that the declaration did

§ 546. The case of *Dilts v. Parke*, 1 Southard (New Jersey), 219, A. D. 1818, recognizes the first proposition, and was decided upon the application of the second. On certiorari from the judgment of a justice of the peace, it appeared from the return, that the plaintiff's claim was that he had become surety upon a note for one Huffman, deceased; that a judgment had been recovered upon the note against the plaintiff; that the defendant "having the property of Huffman in his hands, refused to deliver it up to satisfy the judgment; and that the defendant agreed with the plaintiff that he should not lose the money, but that he would pay it." At the trial the plaintiff gave evidence, "that the defendant confessed that he had property of Jacob Huffman in his hands to pay the debt." The plaintiff having recovered judgment, the defendant sued out a certiorari, upon which the judgment was reversed by the Supreme Court. Southard, J., delivering the opinion, said: "The phraseology of the papers does not make it very manifest, how the defendant obtained possession of the property. From the testimony of Johnson, as detailed by the justice, it might perhaps be inferred that it had been put into his hands for the purpose of paying his debt; and if this were so, the case would be free from all doubt. But the language of the plaintiff in his statement of demand contradicts this idea, and leaves it as the fair conclusion that he came into possession of it, without any

not say that he had received the proceeds. In the same opinion the learned judge also approved the decision in *Jackson v. Rayner*. But in the earlier case of *Watson v. Randall*, 20 Wendell, 201, Nelson, C. J., referring to the opinion of Savage, C. J., in *Farley v. Cleveland* (§ 553), said that there the latter evidently doubted the soundness of both of those cases, because in each the defendant had received property from the debtor as an inducement to the undertaking; a doubt manifestly shared by him. Comstock, C. J., in the course of his opinion in *Mallory v. Gillett*, 21 New York, 412, A. D. 1860, frequently referred to in the course of this work, cited *Simpson v. Patten* without disapprobation; but with respect to the other case he said: "I have some hesitation in citing *Jackson v. Rayner*, because it seems to me to have gone too far." "Upon the discrimination made in the later cases, the conveyance of the property to the defendant was a new consideration, moving to him from the debtor, and made the promise an original one."

reference to the payment of this debt. Was then the recovery against him right? I think not. The debt due to Parke" (the plaintiff in the court below) "was due from Huffman. He or his representatives were originally liable to be sued for it. The assumption by Dilts to pay was clearly within the statute of frauds. It was a promise to pay the debt of another." Here also there was no allegation or proof of forbearance against Huffman, or any other consideration for the defendant's promise.

§ 547. The case of *Scott v. Thomas*,¹ Scammon (Illinois), 58, A. D. 1832, (g) also illustrates the application of the second principle. The declaration alleged, among other things, that in consideration of forbearance to sue the plaintiff's debtors, the defendant agreed that if the debtors did not pay the plaintiff by the next court, he would foreclose a mortgage which he held upon their property, and the plaintiff might buy in the land for \$1.25 an acre, if it would not sell for more; and after satisfying his debt, pay the surplus to the defendant, but that the defendant did not foreclose, etc. To this declaration the defendant pleaded the statute; and the plaintiff demurred to the plea. The court below gave judgment for the plaintiff on the demurrer, and the Supreme Court reversed the judgment. Wilson, C. J., after dwelling upon the fact that the circuit of the process whereby the debt of another was to be paid, could not affect the question whether the statute applied, said that the promise was in effect to pay the debt out of a particular fund, and in a particular way; and it was accordingly held, that as there was no distinct consideration for the promise, moving from the promisee to the promisor, but the original liability of the debtors was in fact the only moving consideration, the promise was within the statute, and the defendant was entitled to judgment upon the demurrer. (h)

(g) Cited also ante, § 117.

(h) The intimation that a new and distinct consideration would take the promise out of the statute, was in accordance with a doctrine then prevailing in this country, but now, we believe, abandoned. See chapter xvii.

§ 548. The third principle is well illustrated by *Quin v. Hanford*, 1 Hill, 82, A. D. 1841, in the New York Supreme Court. The action was originally brought in the New York Common Pleas; and it appeared at the trial that a religious society had made a contract with one Dempsey for work to be done on its church edifice, upon which Dempsey would be entitled to a certain sum of money, beyond what he had already received, when the work should be completed. The defendant was the treasurer of the society; but had no authority to pay out moneys except upon orders countersigned by the building committee, of which he was one. Dempsey, being indebted to the plaintiff, gave him an order upon the building committee or the treasurer; the defendant, as treasurer, then having funds in his hands, applicable to the payment of Dempsey, when his contract should be completed; and on presentation of the order, the defendant promised to pay it within a few days. Soon afterwards the work was completed. The judge at the trial charged the jury that the plaintiff was entitled to recover, and he had a verdict, upon which judgment was rendered in the Common Pleas. On error, the Supreme Court reversed the judgment; holding that the promise was void, as well for want of consideration, (the plaintiff not having promised to forbear,) as because it was within the statute. Upon both points, Bronson, J., delivering the opinion of the court, said that the case bore some analogy to those where an executor or administrator was held to be liable *de bonis propriis*, upon a promise made in consideration of assets; but the distinction was, that there the promisor controlled the fund. Here the defendant was a mere bailee or depositary of the society, having no direct control over its funds. The church could have directed him to pay any other creditor in preference to Dempsey; or it could have recalled the fund and placed it in the hands of another agent. (i)

(i) It is somewhat hazardous to cite any modern English authorities in connection with the rule now under examination, but there is one case, the decision in which, as far as it relates to the application of the statute, is quite

ARTICLE III.

Where the reception of the fund, and the making of the promise, were parts of an agreement to which the creditor, the original debtor, and the promisor were parties.

§ 549. It will be remembered that in discussing the question, whether a creditor could maintain an action for the breach of a promise to pay the debt, which had been made to his debtor, on a consideration moving from the latter, we confined ourselves to the cases, where he was a stranger to the agreement and to the consideration ; separating them

obscure upon any other ground, but very intelligible if we suppose it to have been governed by the third of the principles mentioned in § 533. We refer to *Morley v. Boothby*, 10 Moore 395, and 3 Bingham, 107, decided A. D. 1825. The first count of the declaration alleged, in substance, that in consideration that the plaintiffs would sell and deliver to certain persons, using the firm name of William Clark, Son & Co., certain goods, etc., to be used in and about building St. Philip's church at Sheffield, to be paid for by a bill of exchange to be drawn by the plaintiffs upon them, particularly described, the defendants undertook "that the said bill should be paid, when due, out of such moneys as the defendants should receive, before the said bill should become due, for and on account of the building of the said church;" that the plaintiffs, confiding in the promise, did afterwards sell and deliver to the said William Clark, Son & Co., goods, etc., to be used in and about the building of said church, and did draw their bill of exchange to the terms mentioned, which was accepted, and afterwards dishonored. It was further alleged that "although the defendants received, before the bill became due, and from thence hitherto had had sufficient moneys for and on account of the building the said church to satisfy the said bill," yet they had not guaranteed the payment of the bill or paid the same. There were several other counts, the particulars of which are not given, except that it is said that they varied the terms of the consideration for the defendants' promise, and the time when the bill matured. To all these the defendants pleaded that there was no writing, etc., and the plaintiffs in their replication set out a writing signed by the defendants, and agreeing that the draft (describing it) should at maturity, "be then paid out of money to be received from St. Philip's church." The defendants interposed a special demurrer to the replication, on the ground that no consideration was expressed in the writing. The court gave judgment for the defendants on the demurrer, the principal part of the opinion (by Best, C. J.,) relating to the sufficiency of the writing. The learned Chief Justice assumed that the instrument was given after the sale was made; but as this is inconsistent with the only count of the declaration of which the substance is given in the reports, it is pre-

from those where he was a party to the agreement, although a stranger to the consideration. (a) Those cases of the latter description, where the consideration of the promise was a fund placed in the hands of the promisor by the debtor, will form the subject of this article. The American authorities recognized the right of the promisee to sue in this class of cases, even before the doctrine that a stranger could enforce a contract, made for his benefit, had obtained much recognition.

§ 550. The question whether the statute of frauds is applicable to the promise, is essentially different in the two classes; for in this class the promise was made to the creditor, and it cannot therefore be saved from the operation of the statute, upon the principle, which saves the promise in the other class, that the promisee is not the one to whom the expression "another person" applies. The existence of the fund is therefore the distinguishing feature upon which the promise is sustained, when it was verbal. And although the weight of authority in the United States decidedly favors the doctrine that it is sufficient for that purpose, one of the most venerable and eminent of our tribunals still maintains the contrary opinion; and some adjudications in other courts may possibly be open to the same construction. (b)

§ 551. In New York the rule is now well settled, that agreements of this description are not within the statute;

sumed that the allegations to that effect were contained in the other counts. He concluded however with this observation, of which the last sentence is equally applicable to the first count: "No benefit or advantage accrued to them" (the original debtors) "from that instrument, nor did the plaintiffs suffer any detriment or inconvenience in consequence of the execution of it; and although it speaks of money to be received from St. Philip's church, still it does not appear that the defendants had any particular interest in, or would be in any degree affected by such money," or, as the report in Bingham makes him say, "that the persons subscribing such paper had any thing to do with any such money."

(a) See § 395.

(b) See post, §§ 563, 564, and note at the end of this article.

although the cases of *Simpson v. Patten*, 4 Johnson, 422, A. D. 1809, and *Jackson v. Rayner*, 12 Johnson, 291, A. D. 1815, have been frequently supposed to sanction a contrary opinion. But they belong among the cases where a verbal promise made to the creditor, after the receipt of the fund, was held to be within the statute; and they have been commented upon in the preceding article in that connection. (c) Probably the same state of facts was presented in *Gold v. Phillips*, 10 Johnson, 412, A. D. 1813, where it was held that the promise was not within the statute. But it possessed the additional feature that a like promise was also made to the debtor, at the time of the receipt of the fund; and as the promise to the plaintiff appears not only to have been made subsequently, but also to have lacked consideration, the case has been treated as depending upon the agreement between the defendant and the debtor; and it was accordingly examined with other cases depending upon similar agreements. (d) But it is cited again here, because the court disposed of it upon the hypothesis that both promises were part of one transaction; and it is therefore perhaps the earliest case, in which the principle now under consideration, was sanctioned by a judicial decision.

§ 552. The question was presented squarely for the decision of the New York Supreme Court in *Olmstead v. Greenly*, 18 Johnson, 12, A. D. 1820. There the plaintiff declared upon an agreement, alleging that it was made at his request and by his procurement, to which the plaintiff, the defendant, and one Bristol were parties; whereby Bristol placed in the hands of the defendant goods and money, to an amount exceeding a debt due from Bristol to the plaintiff, and a dishonored note of Bristol and one Higgins, upon which the plaintiff had been charged as indorser; in consideration of which the defendant agreed to pay the debt and the note, but had not done so. The defendant

(c) See §§ 544, 545.

(d) See §§ 404, 405.

pleaded the statute, and the plaintiff demurred to the plea. Judgment was rendered upon the demurrer for the plaintiff; the court saying that this was "an original contract on an independent consideration, received by the defendant, by the procurement of the plaintiff. The plaintiff has the same ground of action, as if he had delivered his own goods to the defendant, as the consideration of the promise."

§ 553. The next case, which has attained considerable celebrity, was *Farley v. Cleveland*, 4 Cowen, 432, A. D. 1825, affirmed in the Court of Errors, A. D. 1827, under the title of *Cleveland v. Farley*, 9 Cowen, 639; but only the opinion delivered in the Supreme Court has been published. Farley sued Cleveland in the Common Pleas; and at the trial he offered to prove that one Moon delivered to the defendant fifteen tons of hay, of the value of one hundred and fifty dollars, in consideration of a verbal promise, then made by the defendant to the plaintiff, to pay him Moon's note of one hundred dollars held by him; but the Common Pleas nonsuited the plaintiff, on the ground that the promise was within the statute of frauds. The judgment thereon was reversed in the Supreme Court, Savage, C. J., delivering an opinion; in which, after reviewing the principal cases in England and in New York, he concluded that the case at bar was similar to *Gold v. Phillips* and *Olmstead v. Greenly*, differing from the latter only in the particular that there it was alleged that the transaction was accomplished by the procurement of the plaintiff. And he laid down the general rule that "in all these cases, founded upon a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or the original debtor, the subsisting liability of the original debtor is no objection to the recovery," a proposition which, as will be seen in the two succeeding chapters, has since undergone considerable modification.

§ 554. This case was followed by *Jennings v. Webster*, 7 Cowen, 256, A. D. 1827, and *Ellwood v. Monk*, 5 Wen-

dell, 235, A. D. 1830 ; in each of which the Supreme Court held that an agreement to which the debtor, the plaintiff and the defendant were parties ; whereby the defendant, in consideration of property then delivered to him by the plaintiff's debtor, sufficient in value for the purpose, agreed to pay to the plaintiff the debt, was not within the statute. But in neither case was this proposition discussed upon principle, the court evidently regarding it as settled by the former adjudications.

§ 555. The case of *Mather v. Perry*, 2 Denio, 162, A. D. 1846, may also be properly included in this class, although the decision was put upon a different ground, which makes it sui generis. There the defendant applied to one Hewitt to make some machine frames, for which he proposed to pay Hewitt in lumber ; but Hewitt wished to be paid in goods out of the plaintiff's store. Thereupon the defendant, the plaintiff and Hewitt agreed verbally that Hewitt should make the frames for the defendant ; that the defendant should pay the plaintiff their value in lumber ; that part of the value of the lumber should be applied upon a debt due from Hewitt to the plaintiff, and for the residue he should be entitled to goods out of the plaintiff's store. Hewitt did the work, and the defendant refusing to pay the plaintiff according to the agreement, this action was brought in a justice's court, and the plaintiff recovered the value of Hewitt's work. The judgment was reversed by the Common Pleas ; and the plaintiff brought error to the Supreme Court, where the judgment of the Common Pleas was reversed, and that of the justice affirmed. Bronson, C. J., delivering the opinion of the Supreme Court, said that in making the frames Hewitt was the servant of the plaintiff, and the defendant's engagement was not to pay Hewitt's debt to the plaintiff, or to pay for goods which the plaintiff should deliver to Hewitt ; but to pay the plaintiff for work which he, by Hewitt, should do for the defendant ; that it was wholly unimportant whether the plaintiff had paid Hewitt ; or whether he was to pay him ; or whether Hewitt ever got his pay.

But it is a very strained inference to call Hewitt the plaintiff's servant, as he was manifestly acting in his own behalf; and the decision can be much more logically sustained upon the ground that his labor furnished the fund from which his own debt was to be paid; and that the goods were to be delivered exclusively upon the defendant's credit.

§ 556. Two cases in the New York Common Pleas, *Cailleux v. Hall*, 1 E. D. Smith, 5, A. D. 1850, and *Stilwell v. Otis*, 2 Hilton, 148, A. D. 1858, also affirm the general principle that a tripartite agreement of the same general character as those in question in the cases decided by the Supreme Court is not within the statute; but they do not present any features requiring a detailed abstract.

§ 557. Passing to the decisions in the other states, we first notice *Wait v. Wait's Executor*, 28 Vermont, 350, A. D. 1856,^(e) which is open to the same observations as those made upon *Gold v. Phillips*; a promise made to the debtor at the time of the conveyance of the property, and one subsequently made to the creditor without a new consideration, having been treated by the court as one transaction, and the ruling being that the statute of frauds did not apply to it.

§ 558. The validity of these tripartite agreements has also been recognized by some recent decisions of the Supreme Court of Pennsylvania; a ruling which is somewhat remarkable, from the circumstance that the same court had previously held, that where the creditor was not a party to the agreement, the statute of frauds prevents him from maintaining an action upon a like promise made to the debtor.^(f) In the earliest, the fund was placed by the debtor in the hands of the promisor as his agent, before the promise was made; and he subsequently

(e) See § 402.

(f) See *Shoemaker v. King*, ante, § 423

directed the promisor to pay his creditor out of the fund. This case is *Stoudt v. Hine*, 45 Pennsylvania, 30, A. D. 1863. There the defendant, under a power of attorney from one Kallahan, had drawn moneys due to Kallahan upon a canal contract; and subsequently the plaintiff, the defendant, and Kallahan met; Kallahan and the plaintiff, after some dispute as to the amount of a debt due from the former to the latter, agreed upon a certain sum as the amount to be paid to the plaintiff; and thereupon the defendant, by direction of Kallahan, verbally agreed with the plaintiff to pay him the amount so fixed, which was less than the sum in his hands. It was held by the Supreme Court, affirming a judgment for the plaintiff, that the promise was not within the statute. It is manifest that the transaction was the same in substance, as if the agreement to pay the plaintiff had been made at the time of the deposit.

§ 559. In *Whitcomb v. Kephart*, 50 Pennsylvania, 85, A. D. 1865, it was held, as in *Mather v. Perry*, that an agreement to pay for work thereafter to be done for a third person was not within the statute, where the consideration was a fund thereafter to be received; but here it was to be received from a fourth person for the benefit of the third; and there was the additional peculiarity that the promisee was to look to the debtor in the first instance. The question arose upon a case stated from the opinion of the court; and the facts, as far as any question arose under the statute, were as follows: One Goss had made a contract with the firm of Langdon and Diven, whereby he was to cut from their land and deliver to them, certain saw logs, at a specified price: and afterwards he had made a subcontract with the plaintiffs to do part of the work, for which he was to pay them a certain price. The defendants were agents of Langdon and Diven, and were furnished with money by them to pay Goss, as the work progressed. It was agreed between the plaintiffs, the defendants and Goss, in substance, that the defendants would pay the plaintiffs for their work the price to be

paid to them by Goss, according to his contract with them, except as far as Goss himself should pay them; and that they would retain the amount which they should so pay, out of the moneys payable to Goss under his contract with Langdon and Diven. As this was construed by the court, it was not a promise to pay out of moneys to be furnished by Langdon and Diven, but to pay absolutely, looking to those moneys for reimbursement; but the case stated found that they had such funds. A judgment in the court below for the plaintiffs, upon the case stated, was affirmed on error; the Supreme Court holding that "the undertaking of the defendants was an original one; the debt had become their own."

§ 560. An agreement, in the ordinary form in such cases, was also sustained by the court in *Clymer v. De Young*, 54 Pennsylvania, 118, A. D. 1867, wherein is to be noticed an extraordinary error in the charge, putting the decision upon a principle entirely inapplicable to the facts. This was an action of assumpsit against Clymer, as administrator of one Frederick Hunter; and it appeared on the trial, that one Samuel Hunter, being indebted to the plaintiff and also to Frederick Hunter, sold his stock of goods to the latter, in payment of his indebtedness to him, and in consideration of his agreeing to pay to the plaintiff the money due to her by Samuel. There was other evidence of the promise; and, according to the report, the judge charged the jury that "if they should find that Samuel Hunter was indebted to the plaintiff, and Frederick had become indebted to Samuel, and it was agreed among the three that Frederick should pay to her, in lieu of Samuel, the amount due by Samuel, and he did pay a part but not the whole, they might give a verdict for the plaintiff for the balance." The jury found a verdict for the plaintiff; and the defendant brought a writ of error upon the judgment, relying upon the objection that the promise was within the statute. The judgment below was affirmed, Read, J., delivering the opinion of the court as follows: "The simple question then is, was the agreement within

the provisions of this section. Samuel V. R. Hunter, as executor of De Young's estate, received moneys belonging to the plaintiff, which were put into the stock of his store, and belonged to her. Being indebted to the decedent, Hunter transferred the stock to him, with the agreement that out of the stock so transferred, the decedent should pay the plaintiff the amount due her. This arrangement was made and agreed to by Hunter, the decedent, and the plaintiff. This brings the case clearly within *Stoudt v. Hine*, 9 Wright, 30, (g) as the fund was provided for by the original debtor, whether his own or that of the plaintiff, to pay the very debt which the decedent promised to pay, and which promise he partly fulfilled. The judge was therefore *substantially* correct."

§ 561. The principle of these cases was also approved in *Nelson v. Hardy*, 7 Indiana, 364, A. D. 1856, where it was assigned, with other reasons, as a ground for taking out of the statute, a verbal agreement between the plaintiffs, the defendants and one Givens; to the effect that the plaintiffs would forbear against Givens upon a debt which he owed them; and in consideration thereof, the defendants would pay the debt, out of the next moneys to become due from them to Givens, upon a subcontract for work upon a railroad, for which the defendants were the principal contractors, whereby Givens was to be paid upon monthly estimates of his work. It appeared in this case that the defendants had in fact deducted the amount of the debt, from the sum due to Givens upon the next monthly estimate.

§ 562. So in *Lucas v. Payne*, 7 California, 92, A. D. 1857, one Moulton, a debtor to the plaintiffs, had conveyed to the defendant Payne, one of the firm of Payne and Dewey, real estate auctioneers, certain real estate equal in value to, or greater than his debt to the plaintiffs, to be sold by the firm for and on account of Moulton; and on

(g) See § 558.

the same day he gave the plaintiffs an order on the defendants for the proceeds of the property, which they accepted; the object of making the conveyance, the order and the acceptance being to secure the plaintiffs' debt. Subsequently Payne and Dewey reconveyed a part of the property to Moulton without consideration, and sold another portion to other persons; and, as it would seem, held the remainder in their hands. On a bill in equity against Payne, Dewey and Moulton, charging confederacy, and praying a decree that Payne and Dewey should perform and execute the trust in favor of the plaintiffs, a decree was rendered in favor of the plaintiffs, and against Payne and Dewey "for the amount of their claim against Moulton," from which, and from the order of the court refusing a new trial, the defendants appealed. And it was held, on the appeal, that the promise of Payne and Dewey was not void by the statute of frauds; and that they could not escape their trust by reconveying to Moulton. And so the judgment was affirmed.

§ 563. On the other hand, in Massachusetts, the rule seems to be quite as conclusively settled that such a promise is within the statute, as it is settled the other way in New York. The case of *Curtis v. Brown*, 59 Massachusetts (5 Cushing), 488, which has already been cited, (h) is open perhaps to considerable criticism, for other reasons besides its repudiation of the New York rule; but the doctrine there affirmed, was reiterated, as far as this question is involved, in the very recent case of *Furbish v. Goodnow*, 98 Massachusetts, 296, A. D. 1867. The report says that upon the trial the plaintiffs relied upon the case stated in their declaration, namely, that one "Redding was indebted to them on a promissory note which they continued to hold; and that by an agreed arrangement between the defendant, Redding and the plaintiffs, Redding conveyed certain real estate to the defendant, and as part of the consideration therefor, the defendant promised to

(h) See § 418.

pay the plaintiffs the amount of the note." It being admitted that the promise was merely verbal, the judge ruled that the action could not be maintained, and there was a verdict for the defendant. The Supreme Court overruled the exceptions taken by the plaintiffs, Gray, J., delivering the opinion of the court. The general rule, laid down by him, as being the only one whereby a promise within the letter of the statute can be excluded from its provisions, is that "if the principal and immediate object of the transaction is to benefit the promisor, not to secure the debt of another person, the promise is considered not as collateral to the debt of another, but as creating an original debt from the promisor, which is not within the statute, although one effect of its payment may be to discharge the debt of another."

§ 564. "But," he added, "if no consideration moves from the creditor to the new promisor, and the original debtor still remains liable for the debt, the fact that the promisee gives up something to that debtor, or that a transfer of property is made or other consideration moves from that debtor to the new promisor, to induce the latter to make the new promise, does not make this promise the less a promise to answer for the debt of another; but on the contrary, the fact that the only new consideration either enures to the benefit of that other person, or is paid by him to the new promisor, shows that the object of the new promise is to answer for his debt." This conclusion was sustained by an elaborate examination of the previous Massachusetts cases, among others *Curtis v. Brown*, the ruling in which was approved; and the learned judge said that such is also the construction in England, examining in detail the modern cases. *Emerson v. Slater*, 22 Howard, 28,(i) is not, he contended, opposed to *Curtis v. Brown*, "for in that case the promise of the defendant was an original undertaking on a good and valid consideration moving from the plaintiff to the defendant." He

(i) A case which will receive a very careful examination in chapter xvii.

continued as follows: "The other cases cited for the plaintiff indeed show that by the later decisions in New York, Maine and Vermont, the application of the statute has been so far relaxed in those states, as to treat a transfer of property from the original debtor to the new promisor, as taking the promise of the latter to the original creditor out of the statute," but the authorities in Massachusetts, being the other way, should be followed by this court. "In this action," he concluded, "brought upon an express promise of the defendant to pay the debt of a third person to the plaintiff, no evidence being offered of a discharge of the original debtor, or of any consideration whatever moving between the creditor and the new promisor, but the only consideration being a conveyance of real estate to the latter from the original debtor; the new promise was, according to the weight of authority, and in our opinion, upon principle, a promise to answer for the debt of another within the statute, and the action cannot be maintained."(*j*)

ARTICLE IV.

Whether, if the fund proves to be insufficient to discharge the promise, the promisor can ever be made liable for the excess of the debt.

§ 565. Several of the preceding cases hold that the promise to pay the debt is presumptive evidence of the sufficiency of the fund for that purpose, and such may be assumed to be the settled rule; so that the plaintiff will

(*j*) This and *Curtis v. Brown* are, we believe, the only modern cases in the United States, which distinctly hold that a promise is within the statute, when it was made in contemplation of a fund, adequate for its fulfilment, furnished by the debtor to the promisor, for the purpose of paying the debt. Still it is proper to say that in *Emerick v. Sanders*, 1 Wisconsin, 77; *Westheimer v. Peacock*, 2 Iowa, 528, and *Johnson v. Morris*, 21 Georgia, 238, (ante, §§ 541, 542, 543), the court may have intended to hold that the receipt of a fund from the debtor makes no difference with respect to the application of the statute; instead of those cases being, as we have considered them, instances where the seventh rule was either overlooked or erroneously applied. The case of *Curtis v. Brown* is also mentioned approvingly in *Clapp v. Lawton*, 31 Connecticut, 95.

not be under the necessity of making any affirmative proof of its sufficiency. But generally the defendant may exonerate himself, in whole or in part, from liability, by showing that the fund was insufficient. The promise is taken out of the statute, upon the presumption that it was to be fulfilled out of the means of the debtor, and not those of the promisor ; and where the contrary clearly appears, a recovery beyond the amount of the debtor's means in the hands of the defendant, would be a plain violation of the spirit of the statute, which the plaintiff has already been compelled to invoke to sanction the violation of its letter.

§ 566. This is sufficiently evident from the cases already cited, and the principles upon which they proceeded, although the question appears to have rarely presented itself directly. It arose, however, very clearly in a case decided by the New York Superior Court, A. D. 1847, *Pike v. Irwin*, 1 Sandford, 14. There the plaintiff, as part of the proceedings to enforce a mechanic's lien, under a statute of New York, sued in the court below for work done by him upon certain buildings, which were being erected for the defendant by a firm of builders, the plaintiff being one of their workmen ; and it was shown that the defendant had requested the plaintiff to serve papers upon him under the lien law, and had promised to pay him, if he would procure an order from the contractors, which he had done. At the trial the defendant offered to prove that all the payments upon his contract with the builders had been made, except the last, which never became due, because the contract had not been fulfilled ; and the court below rejected this evidence, and rendered judgment for the plaintiff. The judgment was reversed upon certiorari, the Superior Court holding that the promise and request to serve the lien papers, were at most an admission that there was something due upon the contract, which the defendant had a right to rebut, by showing the truth of the case to be otherwise. And that the verbal promise could not be sustained upon a considera-

tion moving to the defendant, because the proof that nothing was due would bring it within the statute.

§ 567. And there seems to be no reason why, when the fund consists of property not yet converted into money, and the promise does not in terms depend for its fulfilment upon the receipt of the proceeds by the promisee, the jury should not estimate its value, for the purpose of determining the extent of the liability of the promisor. But when the property transferred became, by the agreement between the debtor and the promisor, the absolute property of the latter, the fact that it fell short in value, or in the proceeds actually realized therefrom, of the amount of the liability assumed in consideration of its transfer, appears to be unimportant. For in that case the fund does not consist of the property or of its proceeds, but of the portion of the purchase price, which the promisor retained in his hands ; and if the debts which he has assumed to pay are larger in amount, than the sum which he is able to realize from the property, that fact proves only that he made a bad bargain, not that he is paying the debt of another from his own means.

§ 568. It has, however, been held, in some exceptional cases, that the promisor may be made liable for more than the amount of the fund, without regard to the question whether he became its absolute owner. Such an opinion was expressed by the New York Superior Court in deciding *Lippincott v. Ashfield*, 4 Sandford, 611, A. D. 1851. There the complaint alleged that the defendant represented to the plaintiffs that he had under his control certain property of a debtor to the plaintiffs, which was worth more than the plaintiffs' demand ; and in consideration that the plaintiffs would forbear against the debtor for twelve months, the defendant verbally promised to sell the property, and pay to the plaintiffs the proceeds within the twelve months ; and that the property should sell for enough to pay the demand. It was further alleged that the plaintiff forbore accordingly, but the defendant had

not performed his agreement. Upon demurrer to the complaint, the court gave judgment for the plaintiff, and this was affirmed upon appeal. Paine, J., in delivering the opinion of the court, said, that there were two promises, neither of which was to pay the debt of another; that the promise by a third person to apply the debtor's own property to pay his debt, was not a promise to pay it himself; and the guaranty added to this promise, that the property shall sell for enough to pay it, was not a promise to pay it. "Neither are both promises, taken together, a promise to pay the debt, although their effect may be to render the promisor liable for so much of it as the property should be insufficient to pay. We do not think the statute is to be extended by a forced construction, to embrace a case which is clearly not within its letter or meaning. The statute, no doubt, means the ordinary promise to pay another's debt; that is, a promise which simply binds the promisor himself to pay the debt with his own means." The learned judge added, but upon the question of the consideration rather than the application of the statute, that the forbearance was not only a detriment to the plaintiffs but also a benefit to the defendant. He had the debtor's property in his hands, and the presumption was that the agreement was made with the debtor's assent. If the promise had been made directly to the debtor, there could have been no question that the consideration was sufficient, and the promise was binding; and the plaintiffs could have maintained an action upon it. There was no reason therefore why he should not sue upon it, when made directly to himself.(a)

§ 569. A ruling to the same effect was made upon a different state of facts in *McKenzie v. Jackson*, 4 Alabama, 230, A. D. 1842. There the defendant had been in partnership with one Gerald; and Gerald had sold out his interest in the partnership stock and credits to the defendant and one Adams; they covenanting, as part of the

(a) See *Ardern v. Rowney*, 5 Espinasse, 254, ante, § 524.

consideration, to pay certain firm debts, and certain individual debts of Gerald, among them a debt due to the plaintiff. The defendant subsequently promised the plaintiff to pay him this debt; and he repeated the promise from time to time during nearly four years. The action was founded upon that promise, the arrangement with Gerald being set forth in the declaration, merely by way of inducement thereto. There was also evidence of forbearance as the consideration of the promise, and that the plaintiff and his relations, at the request of the defendant, had dealt at the latter's store on account of the debt, whereby part of it had been paid. It also appeared that the effects received by the defendant and Adams largely exceeded in value, the amount which they were bound to pay, or at least that such was the estimate; but the evidence also showed, as was assumed upon the trial and the argument, that there was a deficiency in the amount, caused by offsets against the demands transferred by Gerald; but the defendant made no complaint on that account, until about six weeks before the trial. On these facts the defence of the statute of frauds was interposed and overruled, and the plaintiff had judgment; whereupon the defendant brought error to the Supreme Court, where the judgment was affirmed. After discussing the question whether the action could be sustained, upon which point it was held that the promise to the plaintiff constituted the cause of action, and that the consideration of it was the fund received from Gerald; the court proceeded to consider whether the alleged deficiency in the fund constituted any defence to the action. Upon that point the opinion said: "However valid such an objection might be, if seasonably urged, it cannot prevail under the circumstances of this case. The repeated promises of the defendant, made with the opportunity of full knowledge of the facts, are obligatory upon him. It might, and in all probability would operate most injuriously upon the plaintiff, if after having been lulled into a false security for so many years, by the repeated promises of the defendant, and the delays in the collection of the debt conse-

quent thereon, he should now be permitted to allege a failure of the fund from which the payment was to be made. The objection comes too late."

§ 570. It can hardly be said that either of these cases is a conclusive precedent for the rule which it assumes to lay down, because either decision can be very clearly supported, upon a different ground from that upon which it was put by the court. In *Lippincott v. Ashfield*, the plaintiff stated enough in his complaint to have sustained it upon the demurrer, without regard to the question of the amount of damages. Indeed upon proof of the representation and promise to pay the debt, without the guaranty of the sufficiency of the fund, he would have been *prima facie* entitled at the trial to a verdict for the full amount of his debt, according to the weight of authority of the cases cited in the preceding portions of this chapter. And in *McKenzie v. Jackson*, the defendant was a purchaser from the debtor, upon a promise to pay the plaintiff a part of the purchase price. So the amount actually realized by him was of no importance, within the principle stated in the 567th section. The question whether circumstances can ever occur where the promisor will be held to liability beyond the amount of the fund, may therefore be considered as yet open; and whatever may be the rule in an exceptional case, it is clear that ordinarily the fund limits the liability.

CHAPTER SIXTEENTH.

CASES WHERE A PROMISE TO PAY A THIRD PERSON'S DEBT IS NOT WITHIN THE STATUTE, BECAUSE THE PROPERTY OF THE PROMISOR WAS THEN SUBJECT TO A LIEN OR CHARGE FOR THE PAYMENT OF THE SAME DEBT.

§ 571. The classification which we have pursued thus far, now leads us to the examination of the third class of this general division, consisting of cases where the debt assumed by the promise was already a charge upon the property of the promisor. (a) As we have already intimated several times, this subject necessarily involves the consideration of the question, whether the rule which properly governs those cases, should in terms be restricted to them, or whether it should take a much wider range. The proposition has been maintained, upon authority entitled to the greatest respect; that the reason why such cases are not within the statute, is that the leading object of the promisor was to subserve some purpose of his own, distinct from the discharge of the original debtor. Hence it has been argued; that every case is without the statute, where such was the promisor's leading object, and the consideration of the promise moved to him, and tended to promote that object. If these conclusions are correct, it follows that these cases constitute merely a group or subdivision of a more comprehensive class, governed by a rule which makes the existence of this common feature, the test of their exclusion from the provisions of the statute.

§ 572. The question is of much practical importance, and can be intelligently discussed only in the light of those cases, which possess the supposed common feature; but

(a) Ante, § 71.

lack the one which we have adopted as the distinguishing characteristic of this class. Such a discussion will necessarily extend itself to a considerable length ; and clearness and convenience will be promoted by deferring to a subsequent chapter the process of reasoning, and the critical examination of adjudications, by which the rejection of the more comprehensive rule may be justified. And as it is conceded, on both sides of the question, that the cases of this description form a distinct group, if not a class ; let us commence the investigation, by endeavoring to define its true limits, and to ascertain the principles upon which the cases within it are taken out of the statute, and the rule which governs them. But in order to avoid needless repetition, the foundation of the subsequent discussion will be laid, by appropriate observations upon the cases, as they may present themselves. And, as we have already remarked, the principle embodied in the foregoing seventh rule was derived from the earlier cases of the same series ; so that our comments upon them will be framed, and the subsequent inquiry into the true principles which they establish, will be prosecuted with reference to that question also.

§ 573. In most of the modern cases, especially in the United States, it seems to be assumed, rather than expressly decided, that the promisee, in consideration of the promise, must actually surrender the lien or charge upon the promisor's property. Perhaps the true principle will be satisfied, if in fact the fulfilment of the promise will discharge the lien. But in practice it has almost invariably happened, that when a verbal promise to pay the debt has been sustained, it has been founded upon a cotemporaneous surrender of the lien ; and as most of the authorities lay much stress upon that circumstance, it has been adopted as a basis in framing the governing rule, which is accordingly stated in these terms :

RULE EIGHTH.

A promise to pay the debt of another is not within the statute, if its consideration was the abandonment to the promisor of a security for the payment of the debt, consisting of a lien upon, or interest in property, to which the promisor then had a subordinate title.

§ 574. There is one essential condition of this rule, respecting which the English and American cases now agree; although for a long time there was much confusion upon the subject. It is that the lien must have attached to the property of the promisor; for if it was upon the property of the debtor, or of a stranger, the case will be within the statute. We think that upon a fair construction of the English authorities, and perhaps also of the best American authorities, the rule, as thus explained, rests upon the idea that the existing liability of the promisor's property to pay the debt, is equivalent, for this purpose, to his existing personal liability therefor; and consequently that it is immaterial whether the lien be surrendered, if there was some other consideration, sufficient to sustain the promise at common law. But however this may be, it would seem that the interest of the promisor may be acquired simultaneously with the making of the promise, and that it need not be an absolute ownership. The rule is satisfied, according to several cases, if the promisor controlled the property, as the representative of the true owner. (b)

ARTICLE I.

English decisions upon the subject matter of this rule, and also involving the questions to be discussed hereafter in this connection.

§ 575. The series of English decisions, to the examination of which this article is devoted, will be continued to the present time; so as to show the principle which has been established in that country by the modern cases, as properly to be deduced from those of earlier dates. But long before the effect of the latter had thus been settled by the English courts, they had been otherwise construed by American adjudications, which had become local prece-

(b) *Houlditch v. Milne*, 3 *Espinasse*, 86; *Castling v. Aubert*, 2 *East*, 325; *Edwards v. Kelly*, 6 *Maule and Selwyn*, 204; *Bampton v. Paulin*, 12 *Moore*, 497; *Walker v. Taylor*, 6 *Carrington and Payne*, 752; cited in the following article.

dents; whence ensued, for a long time, a wide divergence of opinion between the courts of the two countries. As some of the perplexity to which these early cases have given rise, was caused by insufficient and sometimes incorrect reporting, the reports have been corrected in the following summaries, wherever errors could be detected, either by comparing two or more reports of the same case, or from intrinsic evidence furnished by a careful examination of the only report extant.

§ 576. The earliest of these decisions is the equity case of *Tomlinson v. Gill*, Ambler, 330, A. D. 1756, previously cited in considering the question of the liability of executors and administrators.^(a) There the defendant had promised the widow of an intestate, that if she would permit him to be joined with her in the letters of administration, he would make good any deficiency of assets to discharge the debts; and joint administration was accordingly taken out. On a bill in equity, filed by creditors of the intestate for satisfaction of their debts, it was objected that the promise was within this branch of the fourth section of the statute, as well as that relating to special promises by executors and administrators. But Lord Hardwicke upon that point said: "It is not within the second branch of that clause; the modern determinations have made a distinction between a promise to pay the original debt, and on the foot of the original contract, and where it is on a new consideration." Then, after saying that the distinction taken in *Buckmyr v. Darnell* was "a very slight and cobweb distinction," he added: "Here is quite a new distinct consideration. *Read v. Nash* is strong to the purpose." And the complainants had a decree. This is believed to be the first foreshadowing of the doctrine, which long obtained general recognition in the United States, that any new consideration, distinct from the original debt, and moving to the promisor, would suffice to take the case out of this clause of the statute.

(a) See §§ 18 to 20, and note, where the case is fully commented upon.

§ 577. The next, and by far the most famous of the series, was *Williams v. Leper*, 3 Burrow, 1886, decided in the King's Bench A. D. 1766.(b) There one Taylor, a tenant of the plaintiff, being in arrear for rent to the amount of 45*l.*, and insolvent, conveyed all his effects, for the benefit of his creditors, to the defendant, who advertised them for sale.(c) On the morning advertised for the sale, "Williams, the landlord, came to distrain the goods in the house. Leper, having notice of the plaintiff's intention to distrain them, promised to pay the said arrear of rent if he would desist from distraining; and he did thereupon desist." At the trial the plaintiff had a verdict for 45*l.*, subject to the opinion of the court on a case, whether the promise was within the statute of frauds. The plaintiff's counsel contended that the statute was not intended to apply to a "direct undertaking," founded upon a "new consideration moving from the party making the promise, to the party to whom it was made" (sic), as he said was the case here; the goods being liable to the distress, the plaintiff having lost his interest in them in consequence of reliance on the promise; and the defendant having undertaken directly for himself and not for another. The defendant's counsel, on the other hand, argued that it was directly within the words of the statute, the promise being to pay absolutely, and not out of the goods sold; that the original debtor remained liable; and

(b) S. C., more briefly, and erroneously stated to have been in the Common Pleas, 2 Wilson, 308. Both reports bear evident marks of carelessness.

(c) The report in 3 Burrow, which is generally followed, and from which this abstract is mostly taken, says that the defendant was merely a broker employed to sell the goods by another person, who was the trustee. This is, we think, an error. In the report of the case in 2 Wilson, 308, it is said that Taylor "made a bill of sale to the defendant Leper of all his goods in the said messuage, in trust to be sold for the use of his creditors." And in the course of the argument, as given in Burrow, the plaintiff's counsel at one time spoke of the assigned property as being "the goods of Leper" and at another time said: "The property of these goods was in Leper as trustee for the creditors, at the time when he made this promise." And see Lord Mansfield's remarks as quoted in the text.

therefore the promise was collateral. He added: "The plaintiff cannot recover upon this declaration; it is upon a promise 'to pay the debt to which Taylor was before liable.' If indeed the declaration had averred that Leper promised to pay it out of the produce of the goods when sold; and that in consideration of that promise he had desisted from distraining, that had been a different case."

§ 578. The court unanimously thought that the promise was not within the statute, and directed a judgment for the plaintiff, each of the judges pronouncing an opinion. Lord Mansfield, C. J., said that the case had nothing to do with the statute. "The *res gesta* would entitle the plaintiff to his action against the defendant. The landlord had a legal pledge; he enters to distrain; he has the pledge in his custody. The defendant agrees, 'that the goods shall be sold and the plaintiff paid in the first place.' The goods are the fund; the question was not between Taylor and the plaintiff. The plaintiff had a lien upon the goods. Leper was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien; this has nothing to do with the statute of frauds." Wilmot, J., said: "The plaintiff is in possession of the goods, having entered with intent to distrain them. Leper was the agent for the creditors. He makes this promise in order to discharge the goods of this distress. I consider this distress as being actually made. Leper says 'if you will quit the goods and disencumber the fund I will pay you.' Leper became the bailiff of the landlord, and when he had sold the goods, the money was the landlord's (as far as 45%) in his own bailiff's hands; therefore an action would have lain against Leper for money had and received to the plaintiff's use." Yates, J., is said in the 3d of Burrow to have put his opinion on the ground that it was "an original consideration to the defendant." Aston, J., said: "If this was a promise to pay the debt of Taylor, I should think it within the statute." "But I look upon the goods here to be the debtor, and I think that Leper was not bound to pay the landlord more than the goods sold

for, in case they had not sold for 45*l*. The goods were a fund between both; and on that foot I concur.”(d)

§ 579. In *Houlditch v. Milne*, 3 Espinasse, 86, A. D. 1800, the action was in assumpsit for the repair of carriages; and it appeared in evidence that the carriages belonged to one Copey; that the defendant had sent them to the plaintiffs to be repaired, and had given orders respecting them; that the bill was made out in the name of Copey; and that when the carriages were repaired, the defendant sent an order to pack them up and send them on board ship. On the plaintiffs' inquiring who was to pay for them the defendant answered, “he had sent them and he would pay for them;” the carriages were accordingly packed up and sent on board ship, (but it does not appear to whom they were consigned or delivered); and the bill was sent to the defendant, who was afterwards called upon twice to pay it. On the first occasion he complained of its amount, but said that “he would settle it;”

(d) In the 2d of Wilson, Yates, J., is reported to have said: “The defendant's promise is an admission that the goods were sufficient to satisfy the plaintiff's demand, and it was a new contract upon a good consideration; the defendant had an interest, and the plaintiff gave up his right to distrain.” It is also said there, that the court held that if the defendant had sold the goods and received the money, an action for money had and received would have lain; from which, as well as from the argument of the counsel as reported in the 3d of Burrow, it is quite evident that the declaration did not contain the common counts, and that it did not appear that the money had been received upon the sale of the goods. Were not the remarks of Aston, J., quoted in the text, as well as the above mentioned remark of Yates, J., called out in answer to the suggestion of the defendant's counsel that the promise would be good if it was to be fulfilled out of the fund? Messrs. Patteson and Williams, in their note to *Forth v. Stanton*, 1 Williams's Saunders, 211, say that the remark that the goods were the debtor means that the promise was not to pay another's debt, but a debt for which the defendant's goods were liable, and they add: “It is submitted that this is the true ground of the decision, and that if the defendant had not been the owner of the goods, the promise must have been in writing,” and this is now regarded by the English courts as containing the true explanation of the case. See *Fitzgerald v. Dressler*, 7 Common Bench, N. S., 374 (§ 590, post), and the citations from the text books in the note to § 606.

and on the second occasion he said that it was most exorbitant, and a fit subject to refer; "he however said he had the money to pay it, but did not say whether his own or Mr. Copey's." Upon this, Best, Serjeant, for the defendant, contended that there being no proof of the defendant's having money of Mr. Copey's in his hands, to apply to the count in the declaration for money had and received, the plaintiffs must be nonsuited, as Copey was liable to them, the bill having been made out to Copey, and containing charges for work done by Copey's own order. But Lord Eldon declined to nonsuit, thinking that the principle in *Williams v. Leper*, where the defendant was held to be liable, "though it was clearly the debt of another," applied to this case, and adding: "The plaintiffs had to a certain extent a lien upon the carriages, which they parted with on the defendant's promise to pay; that, he thought, took the case out of the statute, and made the defendant liable for the amount of the bill." So the plaintiffs had a verdict. (e)

§ 580. The next case of the series was *Castling v. Aubert*, 2 East, 325, decided in 1802. This was an action to recover damages for the breach of an agreement, and there was also a count for money had and received. At the trial the plaintiff had a verdict, subject to the opinion of the court upon a case, the contents of which may be thus briefly stated. The plaintiff, a broker, had in his hands certain policies of insurance belonging to one Grayson, upon which losses had occurred; and the plaintiff had a lien upon the policies, to indemnify him against his

(e) In the note to *Forth v. Stanton*, 1 Williams's Saunders, 211, this case is explained, on the ground that the circumstances showed that the entire credit was given to the defendant, and that Copey was not liable. But some of the circumstances repel such an idea. And see note to § 586, post. According to the American ruling, the defendant's statement would be regarded as an admission that he had been put in funds by Copey to pay the debt, and he would be holden on that ground. But independently of that principle, the case may be supported on the ground that the defendant controlled the possession of the goods.

acceptances of accommodation bills, drawn on him by Grayson. The defendant, another broker, to whom Grayson had transferred his insurance business, wished to procure the policies, in order to collect the moneys due thereon for his principal; whereupon the plaintiff, the defendant and Grayson met, and the defendant, in consideration that the plaintiff would surrender them to him, verbally promised to the plaintiff to provide for the acceptances, and did so in part; but in consequence of his failure fully to provide for them, the plaintiff sustained damages to the amount found by the jury. It also appeared that the defendant had received from the underwriters moneys much beyond the sum in dispute. It was held by the whole court that the promise was not within the statute.

§ 581. Lord Ellenborough, C. J., said that in this case the plaintiff would be entitled to recover upon the count for money had and received, as it appeared that the defendant had collected upon the policies more money than the amount of the plaintiff's lien. And upon the question whether the promise was within the statute he added, that the defendant "procured from the plaintiff the securities upon the faith of this engagement, in entering into which he had not the discharge of Grayson principally in his contemplation, but the discharge of himself. That was his moving consideration, though the discharge of Grayson would eventually follow. It is rather therefore a purchase of the securities which the plaintiff held in his hands." "In the case of a bill of exchange for which several persons are liable, if it be agreed to be taken up and paid by one, eventually others may be discharged; and the same objection might be made there; but the moving consideration is the discharge of the party himself and not of the rest, though that also ensues." He concluded that he agreed with *Williams v. Leper*, to its full extent, namely, that the case was not within the statute of frauds, and with Mr. Justice Aston, "that the evidence sustains the count for money had and received." Grose, J., agreed on both points; and Lawrence, J., said

that it was a purchase of the plaintiff's interest, not a bare promise to pay another's debt, but a promise to pay what the plaintiff would be liable to pay, if the plaintiff would furnish him the means of so doing: *Le Blanc, J.*, concurred, on the ground that the fund was adequate to the discharge of the incumbrances, and the defendant took it with the incumbrances upon it. So the plaintiff had judgment upon his verdict. (f)

§ 582. The next case in the series, *Barrell v. Trussell*, 4 Taunton, 117, A. D. 1811, in the Common Pleas, although frequently cited with the rest, is believed to have no application to any of the principles to be examined in this connection; as the declaration and the proofs did not show that the plaintiff had any thing but an absolute title to the goods. *Mansfield, C. J.*, said that it was unintelligible, and that "there is nothing to show it is an under-

(f) In 3 *Parsons on Contracts*, fifth edition, page 27, note, Lord Ellenborough's remark, relative to the principal object of the contract, is stated to have been that the defendant had his own discharge in view, which, it is said, cannot be sustained upon the facts as reported, because he was acting exclusively for Grayson; and it is therefore intimated that the defendant must himself have been liable upon the bills. *Mr. Roberts*, in his *Treatise on the Statute*, page 229, also comments upon the case as if Lord Ellenborough referred to the defendant, although he does not attempt to explain the apparent inconsistency. But although the expression is certainly very awkward, we understand it to mean that in making the contract, the plaintiff and the defendant had not in view the discharge of Grayson from liability, absolute or contingent, to the plaintiff; but rather the discharge of the plaintiff from liability to the holder of the acceptances. This accords with the remark, immediately following, that it was a purchase. The illustration drawn from the parties to a bill of exchange is equally obscure, not to say unfortunate. It was remarked in another place, that the promise in *Castling v. Aubert* was made to the debtor, and might have been taken out of the statute on that ground, had it been thought of; but regarding the promise as an undertaking for Grayson's debt, it comes fairly within our eighth rule. But it is now settled in England that this case was decided upon the ground that the transaction was a purchase. See note to *Forth v. Stanton*, 1 *Williams's Saunders*, 211, and extracts from English text books in the note to section 606, post; also *Fitzgerald v. Dressler*, 7 *Common Bench, New Series*, 374, post, § 590. This view is commented upon in the note to § 647.

taking to pay the debt of another." A remark of Heath, J., during the argument, has been erroneously construed as intimating that the mere surrender of a lien would take a promise out of the statute; what he said was that such a surrender was a *good consideration*, which was followed by a remark from "the court," to the effect that a good consideration is required, whether the promise is in writing or not.

§ 583. But the question of the application of the statute was directly presented in *Edwards v. Kelly*, 6 Maule and Selwyn, 204, decided in the King's Bench, A. D. 1817. There the plaintiff, having distrained, for rent in arrear, goods which the tenant was about to sell, and which were of greater value than the amount due for rent, agreed with the defendants to deliver up the goods, and to permit them to be sold by one of the defendants for the tenant, upon the defendants' joint undertaking to pay the plaintiff the rent in arrear. The goods were thereupon delivered to the defendants, and sold according to the agreement, by the defendant designated thereby. At the trial the plaintiff had a verdict, subject to the opinion of the court upon a case stating the foregoing facts. The court held that the agreement was not within the statute. Lord Ellenborough, C. J., said: "Perhaps this case might be distinguishable from that of *Williams v. Leper*, if the goods distrained had not been delivered up to the defendants. But here was a delivery to them, in trust, in effect to raise by sale of the goods sufficient to satisfy the plaintiff's demand; the goods were put into their possession, subject to this trust, so that in substance this was an undertaking by the defendants that the fund should be available for the purpose of liquidating the arrears of rent. There was therefore a consideration for this promise, partly falling within the authority of *Williams v. Leper*, partly within that of *Read v. Nash*." (g) Abbott, J., concurred with the chief justice. But Bayley, J., while agreeing that

(g) See § 130.

Williams v. Leper decided this case, also thought that as in this case the distress had been actually made, the debt due from the tenant was suspended at the time the promise was made, so that there was no debt then owing to which it could be collateral; and with him Holroyd, J., agreed. (h)

§ 584. The next case, *Bampton v. Paulin*, 12 Moore, 497, A. D. 1827, has been, we think, misunderstood, chiefly on account of an imperfect and in some respects erroneous report of the case in 4 Bingham, 264. The declaration was to the effect that one Donaldson and one Smith were tenants of the plaintiff and in arrear for their rent; that the defendant had been employed by them to sell certain goods on the premises, which were liable to be distrained for the rent, and which the plaintiff intended to distrain accordingly; and the defendant, in consideration of forbearance to distrain, "undertook to pay the rent out of the proceeds of the sale." At the trial the proof was that the defendant was an auctioneer, who had been employed by a mortgagee of Smith and Donaldson; and on a demand being made for the rent by the plaintiff's sister he said, "Madam, I will see that you shall be paid." A verdict having been rendered for the plaintiff, the defendant applied for a rule nisi to set it aside, on the ground that the promise was within the statute, which the court refused. Best, C. J., cited *Williams v. Leper*; but he rested his decision upon the authority of *Castling v. Aubert*, detailing the facts of that case, including the receipt of the money by the defendant, and saying that "it embraces the very same principle that is involved in the present case." However Park, J., referred to *Williams v. Leper* alone. (i)

(h) Unless the plaintiff in *Williams v. Leper* is to be regarded as having actually made a distress, this case, *Castling v. Aubert*, and *Walker v. Taylor*, are the only cases of the series, where the consideration of the promise can be regarded as having been a fund proceeding from the creditor, without doing some violence to the facts. Here the plaintiff had the fund in hand, but according to the suggestion of Bayley, J., and Holroyd, J., that fact sufficed to show that there was no debt.

(i) The principal error of the report in 4 Bingham is that it omits all refer-

§ 585. In *Thomas v. Williams*, 10 Barnewall and Cresswell, 664, A. D. 1830, there was a special count in the declaration, founded upon the defendant's promise, upon which the verdict was rendered. At the trial it was shown that the defendant was an auctioneer, and had been employed to sell the goods of the plaintiff's tenant; and the plaintiff, on the day of the sale, "went on the premises with a bailiff and a notice of distress" for an unpaid balance of rent due the preceding Lady day; and in consideration that he would forbear from distraining, the defendant promised to pay him the said balance of rent, and also another instalment of rent to become due, under the same lease, at Michaelmas following. The plaintiff did not distrain and the sale proceeded. The plaintiff had a verdict for a sum formed of the balance of the rent due at Lady day, and the rent to become due at Michaelmas; and a rule nisi was obtained to set it aside on the ground that the promise was within the statute. The rule was made absolute, the court holding that the promise was within the statute, because it included the rent yet to accrue; and being entire, and void as to that, it was void in toto. But the opinion of the court, delivered by Lord Tenterden, C. J., contains an instructive criticism upon some of the preceding cases.(j)

ence to the fact that the debt was payable out of the proceeds, upon which we conceive that the case turned. It is true that the very brief report of the facts proved, contained in 12 Moore, does not in terms state that the promise was express to pay out of the proceeds; but the declaration so stated, and had it not been so proved, or to be inferred by the jury, it is clear that there would have been a variance.' And the manner in which Best, C. J., states the points of *Castling v. Aubert* indicates very strongly that such was the promise.

(j) His Lordship said: "Several cases were quoted at the bar, in support of the plaintiff's claim; but there is no case in which the promise of payment has gone beyond the amount of the right vested in the party to whom the promise was made, or beyond the assumed value of the fund out of which the payment was to be made." Referring to *Edwards v. Kelly* and *Castling v. Aubert*, he said that in each of them the plaintiff actually gave up to the defendant property in his possession, and the promise was founded upon a new consideration distinct from the original debt. And in *Williams*

§ 586. In the *nisi prius* case of *Walker v. Taylor*, 6 Carrington and Payne, 752 (A. D. 1834), one Cundell, a publican, had died, and the plaintiff, an undertaker, had been employed by the widow to conduct the funeral; and she had placed in his hands the beer and spirit licenses of the deceased, as security for the payment of his bill. The defendant and his partner were creditors of the estate, and the defendant, wishing to administer on the effects of the deceased, offered the widow 30*l.* to allow him to do so. She consented, but in addition stipulated that he should pay the plaintiff's bill; and the defendant gave orders to make an inventory and value the stock; but the letters of administration were granted to the defendant's partner. The defendant after the grant of letters, (and after a threat of proceedings against the plaintiff had been made by the administrator), applied to the plaintiff to deliver up the licenses to him; and the plaintiff did so on his promising to pay the bill, which was delivered at the same time to the defendant, made out against the administrator. The plaintiff having brought this action upon the defendant's promise, it was objected at the trial that it was within the statute, but Tindal, C. J., said: "But it is a new contract

v. Leper there was a power of distress and an intention to enforce it, and the judges must have considered that power as equivalent to an actual distress. After intimating a doubt respecting the correctness of that decision, he said that at all events it did not go beyond the rent then actually due, and he added: "But this reasoning will not apply to the accruing and future rent. The plaintiff could not have distrained for that rent. The defendant, by paying all that was due at Lady day, might have proceeded to sell the goods. If that sum were paid or secured, the plaintiff sustained no loss or detriment by the sale of the goods. So that the promise to pay the accruing rent exceeded the consideration, and cannot be sustained on the ground on which the cases referred to are to be sustained; but is nothing more than a promise to pay money that would become due from a third person, and is within the words of the statute, and the mischief intended to be remedied thereby." This case seems to be entirely at war with the theory, that those where the property delivered to the defendant was not in the actual possession of the plaintiff, can be sustained on the ground of a purchase. For in that aspect it would be immaterial what price the defendant agreed to pay therefor.

under a new state of circumstances. It is not 'I will pay if the debtor cannot;' but it is 'in consideration of that which is an advantage to me, I will pay you this money.' There is a whole class of cases, in which the matter is excepted from the statute, on account of a consideration arising immediately between the parties. It is a new contract; it has nothing to do with the statute of frauds at all." Afterwards in summing up to the jury, he said that the plaintiff had a claim on Mrs. Cundell for the expenses of the funeral, and the administrator was also liable for them; but it was for the jury to say whether the defendant made the promise; and the plaintiff had a verdict.(k)

§ 587. In *Clancy v. Piggott*, 4 Nevile and Manning, 496, A. D. 1835,(l) the declaration stated that one Moore was indebted to the plaintiff in the sum of five pounds; that the plaintiff had in his possession goods of Moore, of the value of twenty pounds, as security for the payment of his debt, and having a lien thereon; and in consideration that the plaintiff, at the defendant's request, would give up the possession of the goods to Moore, and abandon his lien thereon, the defendant promised to pay him the five pounds. To which the defendant pleaded that the supposed promise was contained in a writing set forth in the

(k) In Selwyn's *Nisi Prius*, thirteenth English edition, page 775, the author cites the remark contained in the note to *Forth v. Stanton*, 1 Williams's *Saunders*, 211, that in *Houlditch v. Milne*, 3 *Espinasse*, 86, (§ 579), the credit must have been exclusively given to the defendant; but he says that this explanation will not apply to *Walker v. Taylor*, and that it would seem that both of those cases are overruled by *Gull v. Lindsay*, 4 *Exchequer* 45 (§ 589). And in *Chitty on Contracts*, eighth English edition, 478, it is said that *Walker v. Taylor* cannot be supported within the rule in *Williams's Saunders*. The chief justice's remark affords considerable support to the doctrine, that where the leading object of the promisor is to subserve his own interest, the promise is not within the statute; but upon the facts of the case, it was simply the surrender of a lien (although perhaps untenable) to the representative of the owner.

(l) S. C., 2 *Adolphus and Ellis*, 473, and 1 *Harrison and Wollaston*, 20. The former report contains a serious error, in stating the amount of the debt as 50*l.*, while agreeing with the others that the fund amounted to only 20*l.*

plea, and which was in the following words: "Sir, I hereby agree to see you paid within three months from date hereof, the amount of 5*l.* due to you on account of Mr. George Moore, junior." On demurrer to this plea, the court unanimously gave judgment for the defendant, because the writing did not express the consideration, and the plaintiff by his demurrer had admitted that it contained the real contract between the parties, the case being one to which the statute applied.^(m)

§ 588. In *Tomlinson v. Gell*, 6 Adolphus and Ellis, 564, A. D. 1837,⁽ⁿ⁾ the declaration stated in substance that the defendant and the plaintiff, the latter acting with the consent of one Buxton, had settled a suit in equity, which had theretofore been pending in favor of Buxton against the defendant, in which the plaintiff had been solicitor for Buxton, and wherein certain costs and charges had become due to him as such; that the terms of such settlement were that the suit should be discontinued, and that the defendant should pay to the plaintiff his costs; and that in consideration thereof the defendant promised the

(m) None of the judges made special reference to the previous lien cases (although counsel cited and discussed them,) except Littledale, J., who said: "It is clear to me even upon the declaration in this case, that this was a promise to pay the debt of another person, notwithstanding all that is said about the lien on the goods; but upon the construction of the statute of frauds, it has been held that if there be a new consideration moving from the plaintiff to the defendant, though it is a promise to pay the debt of another person, it need not be in writing. Upon the face of this declaration there is a new consideration, which *prima facie* would appear to make a promise in writing unnecessary. But the defendant, in the beginning of his plea, avers that the promise mentioned in the declaration is a special promise to answer for the debt and default of another person, which is no more than what is stated in the declaration itself; and then it goes on to state that there was no agreement," etc. Although these remarks are obscure, and doubtless badly reported, they sufficiently indicate that the ground of the distinction between this case and the others was that the property was delivered back to the debtor.

(n) S. C., 1 Nevile and Perry, 588, and Willmore, Wollaston and Davison, 229.

plaintiff to pay the costs. The defendant pleaded that there was no writing, etc., and the plaintiff demurred to the plea. Judgment was given for the defendant upon the demurrer, on the ground that the plaintiff's client was primarily his debtor, and the plaintiff had not discharged him. But Patteson, J., after concurring with the other judges, in their ruling that this was a promise to pay the debt of another, added: "It is said, however, that a new consideration arose from the discontinuance of the suit. I do not think it is a new one. The cases on that point have been where something has been given up by the plaintiff and acquired by the party making the promise; as the security of goods for a debt."(*o*)

§ 589. The next case of the series is *Gull v. Lindsay*, 4 Exchequer, 45, A. D. 1849, (*p*) which is frequently cited as having some bearing upon the proposition, that the promise is out of the statute, where the leading object of the promisor was to subserve his own interest. But although the declaration was perhaps adapted to present that question, the case seems to have been disposed of on the ground of a variance between the declaration and the proof; and its effect upon the present subject of inquiry is consequently quite obscure; although some of the observations of Pollock, C. B., militate against the existence of such a rule of law. (*q*)

(*o*) The report in 1 Nevile and Perry omits from this remark the important words, "and acquired by the party making the promise;" but in Willmore, Wollaston & Davison the expression is even stronger than that quoted in the text, viz.: "Where the plaintiff, having acquired something more than the original claim," "as a lien by distraining goods in the hands of the defendant, has given up that advantage to the defendant." See *Prentice v. Wilkinson*, 5 Abbott's Practice Reports, N. S., 49, cited ante, § 137.

(*p*) S. C., 18 Law Journal, N. S., Exch., 354.

(*q*) The first count of the declaration stated, in substance, that the plaintiff was a ship broker, and had been employed by the owners of a certain ship to procure a charter party, upon terms that he should collect the freight and thereout retain his commissions; that he procured such a charter party, and the ship arrived in London pursuant thereto; that before her arrival, one of the original owners had sold out his interest in the ship to another person;

§ 590. The most recent of these cases is *Fitzgerald v. Dressler*, 7 Common Bench Reports, New Series, 374,

that the plaintiff was about to collect the freight so as to satisfy his commission; that the defendants had been employed as the brokers of one of the original owners, and of the person who had purchased an interest as aforesaid, the two interests represented by them amounting to 60-64ths of the whole; that by obtaining possession of the ship they would receive their commissions for rechartering her; that they were otherwise interested in obtaining possession and control of her; and that in consideration thereof, and that the plaintiff would relinquish his right to collect the freight, the defendants promised to pay him his commission. There were the usual averments of performance by the plaintiff, and of a breach on the part of the defendants. To this was subjoined the common counts. At the trial the plaintiff proved substantially the facts set forth in the declaration, to the time of the arrival of the ship. It further appeared that after her arrival, the defendants' principals had directed a stop to be put upon the cargo, for the freight payable under the charter party; as the charterers claimed to hold a bottomry bond on the ship for advances, etc., and to retain the freight due from them on account thereof; and also that the captain refused to deliver up the ship's certificate till his accounts should be settled; thereupon the plaintiff, the defendants, the captain, and the charterers entered into a written agreement; the substance of which was, as far as the plaintiff's claim was concerned, that none of the parties to the agreement should put any stop on the freight, and that the defendants would pay the plaintiff his commission. The defendants objected that there was a variance between the declaration and the agreement, and that the latter was incompetent within the statute of frauds, because it did not disclose any consideration moving from the plaintiff. The plaintiff had a verdict, with leave to the defendants to move to set it aside and enter a verdict for the defendants or a nonsuit, the court to have the same power of amendment as the judge at nisi prius. A rule nisi was obtained accordingly, which after argument was made absolute, Pollock, C. B., delivering the opinion. He said that the consideration stated in the written agreement was essentially different from that alleged in the declaration. "It is not," said he, "an agreement by the defendant to pay, in consideration of the plaintiff abandoning his rights, arising from several matters stated by way of inducement; but it is an agreement in consideration of his agreeing not to put, or cause to be put, a stop on the freight. It is not in consideration of his not asserting any lien upon the freight, without regard to the question whether he was or was not entitled to such lien." The learned Chief Baron added that the inducement was material as the declaration was framed; but immaterial as to the contract established. This was a contract to pay the debt of another within the statute of frauds; for, although the defendants agreed to pay the plaintiff, the debt still remained due to him from the former owners. "It was therefore necessary that the

decided in the Common Pleas A. D. 1859.(r) There the evidence given at the trial, on the part of the plaintiffs, tended to prove the following facts. The plaintiffs, who were the importers of a cargo of linseed which was yet to arrive, sold the linseed, through their brokers, to Haakman and Co. at a certain price per quarter, payable fourteen days after landing; subsequently, and before the arrival of the linseed, Haakman and Co., through the same brokers, sold it to one Schenck at an increased price, payable at the same time; and after the linseed had arrived, but before it had been landed, Schenck, through the same brokers, sold it to the defendant at a further advance, payable at fourteen days from the day of sale. Five days after the last sale, the defendant, through his clerk, applied to the brokers for a delivery order for the seed; and they having referred the clerk to the plaintiffs, a conversation took place between the plaintiffs' clerk and the defendant's clerk, the substance of which was, that if the plaintiffs would give the defendant the delivery order, the defendant would pay them for the seed. An order was accordingly given to deliver the seed to the brokers, and it was taken by the defendant's clerk to the brokers, who, on being informed by him that he had promised the plaintiffs, in behalf of the defendant, to pay for the seed, indorsed the order so as to make the seed deliverable to the defendant; and upon the order the defendant received the seed. The next day he sent to the brokers a check for 900*l.* on account of his purchase. The seed having been afterwards landed and measured, it was discovered that the amount payable to the plaintiffs by the terms of their contract with Haakman and Co. was 971*l.* 15*s.* 6*d.*, and this action was brought to recover the difference of 71*l.* 15*s.* 6*d.* At the trial the plaintiffs had a verdict; and the

consideration should appear in writing, signed by the defendants; and the consideration, we have already stated, is a very different consideration from that declared on." There could be no amendment, he continued, because it was not a variance; the amendment would require striking out the inducement, and introducing new matter creating a totally different consideration.

(r) S. C., 29 Law Journal, N. S., C. P., 113; 5 Jurist, N. S., 598.

defendant obtained a rule nisi to set aside the verdict and enter a nonsuit, on the ground that the contract should have been in writing; and on two other grounds, one of which was that the evidence did not show that the defendant authorized his clerk to make the contract.

§ 591. Upon the last mentioned ground the rule was made absolute by a majority vote; but all the judges agreed that the contract was not within the statute. Cockburn, C. J., upon that point said that the rule is correctly laid down in the notes to *Forth v. Stanton*, 1 Williams's Saunders, page 211e, that "the question whether each particular case comes within this clause of the statute or not, depends, not on the consideration of the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant *or his property* except such as arises from his express promise." His Lordship added that the proposition must be considered as embracing the qualification at the end of this passage; that it is "truly stated there, as the result of the authorities, that if there be something more than a mere undertaking to pay the debt of another, as where the property, in consideration of the giving up of which the party enters into the undertaking, is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute; which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking." In this case, he added, the seed was the property of the defendant, subject to the plaintiffs' lien for the price, the giving up of this lien being the consideration for the promise; consequently the case clearly comes within the qualification in the note to Williams's Saunders. Williams, J., said that the defendant was at the time of the promise the owner of the linseed, subject to the plaintiffs' lien for the contract price, and the effect of the promise was neither more nor less than to get

rid of the incumbrance; or, in other words, to buy off the plaintiffs' lien, and for that reason the case was not within the statute. He added that *Williams v. Leper* proceeded upon the ground; that the promise was to pay a debt to which the defendant's property was subject, and not simply a promise to answer for the debt or default of another. That this was in accordance with *Castling v. Aubert* and *Anstey v. Marden*, which, as the note referred to by the Chief Justice stated, proceeded upon the ground that the transaction was in effect a purchase of an interest in the property, and not a mere promise to pay the debt of another. And in these opinions Crowder, J., and Willes, J., concurred.(s)

(s) In the Law Journal report it is said that a case was settled for an appeal from this decision to the Court of Exchequer Chamber, but the appeal was abandoned. The head note to the report in the Jurist states the decision upon the application of the statute thus: "In such case, the time for B's payment to A of the price agreed on not having arrived, when C applied for the delivery order, his promise to pay for the goods, if A would take off his lien, would not have been a promise to pay for the debt, default, or miscarriage of another." But none of the judges made any allusion to the fact that the debt from Haakman and Co. to the plaintiffs, was not payable when the defendant applied for the order; on the contrary the decision was expressly put upon a ground, equally applicable to a case where the debt was presently payable. As a part of this series of cases are sometimes also cited Love's case, 1 Salkeld, 28, A. D. 1706, *Anstey v. Marden*, 4 Bosanquet and Puller, 124, and *Stephens v. Pell*, 2 Crompton and Meeson, 710, A. D. 1834. Love's case holds that a sheriff may recover upon a promise of a stranger to the judgment, that he would pay the amount due on a fieri facias, in consideration that the sheriff would restore goods which he had levied on; but nothing was said in the case relative to the effect of the statute. *Anstey v. Marden* has been heretofore fully cited. (See ante, § 118.) *Stephens v. Pell* is merely to the effect that where the defendant, an assignee in bankruptcy, promised the plaintiff to pay him a sum due from the bankrupt for rent in arrear, "out of the sale of the produce of the effects," in consideration of his withdrawing a distress upon the goods; and the goods in fact sold for more than the amount of the rent in arrear; the plaintiff, upon the execution of a writ of inquiry, cannot be required to prove that there was a surplus to meet his demand, after satisfying certain executions which were prior to the distress. The case turned upon the true construction of the defendant's promise; which, for aught that appears, was in writing.

ARTICLE II.

American cases wherein the rule is established, and its application illustrated.

§ 592. The order which we have adopted, for the discussion of the perplexing questions connected with the subject now under examination, defers till the next chapter the consideration of most of the legal theories, based upon the earlier decisions of the foregoing series. Chief among these is the doctrine adopted by Chief Justice Kent, in *Leonard v. Vredenburg*, 8 Johnson, 23, as the definition of his third class of cases; namely, "when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm, moving between the newly contracting parties." (a) Such cases, he said, are not within the statute of frauds. The application of this doctrine to the principles now under examination is so direct, that a glance at its consequences upon this class of cases is also necessary in this place.

§ 593. It seems to be quite evident, although a very able jurist has forcibly defended the contrary conclusion, (b) that this doctrine practically makes the application of the statute depend, in this class of cases, upon the nature or character of the consideration. Whether the discharge of the lien would operate to relieve the property of the promisor, or of the original debtor, is immaterial under a rule, which merely requires the consideration to be new and original; to move between the newly contracting parties; and to consist of benefit to the one, or harm to the other. It must of course be new, or it could not satisfy the common law; it must be original, that is to say, something more than forbearance to the debtor; but in either event, the request of the promisor is ample to satisfy the requirement, that it should move between the new parties; and if it was of no benefit to him, it was at least a damage to the promisee.

(a) See ante, § 63.

(b) Comstock, C. J., in *Mallory v. Gillett*, post, § 597 and note.

§ 594. Accordingly the doctrine that the surrender, either to the new promisor or to the original debtor, of any lien available for the security of the promisee, suffices to take out of the statute a promise to pay another's debt, became generally prevalent in the United States; and was understood, until comparatively recently, to be a settled principle of American jurisprudence. But it is now admitted by the best authorities, that the true rule requires that in all such cases the promisor must have been interested in the property, upon which the lien attached, so that he acquired whatever was surrendered by the promisee; and that wherever the lien was surrendered to the original debtor, the promise cannot be taken out of the statute for any reason depending upon the existence of a lien. This doctrine must, we think, be regarded as a distinct declaration that Chief Justice Kent's third proposition is not law. The American authorities have not, however, quite adopted the comprehensive reason for this conclusion which appears to prevail in England; although we think the tendency of the more recent decisions is in that direction.

§ 595. It is unnecessary to examine the cases, where a verbal promise to pay another's debt has been sustained, under the old rule, by reason of the surrender of a lien upon the debtor's property. Some of them have already been cited in the preceding pages, the circumstances permitting them to be ranged under some other principle which is yet recognized as controlling. In many of the others, the facts were such, that the decision can be sustained within the rule as it is now understood; but as these profess to depend upon the obsolete rule it would be a needless consumption of time and space to examine them in detail. However, some of them will be incidentally referred to in the notes.

§ 596. The modern doctrine upon this subject derives its origin from *Nelson v. Boynton*, 44 Massachusetts (3 Metcalf), 396, decided A. D. 1841. There the plaintiff had

commenced a suit against the father of the defendant, upon two notes made by the latter, and had issued an attachment in that suit, and levied the same upon the father's real estate; whereupon, in consideration that the plaintiff would discontinue that suit, the defendant orally promised to pay the notes; and this action was brought upon that promise. In the court below, the jury were instructed that the promise was not within the statute, and the plaintiff had a verdict, which was set aside by the Supreme Court and a new trial granted, Shaw, C. J., delivering the opinion of the court, after pointing out the general object of the statute, and the general rules for its construction, said that it has been argued that this case was within *Williams v. Leper*, and its kindred cases, in which the creditor had a lien upon property, which was discharged at the request and for the benefit of the party promising. He cited and commented upon several of those cases, and added: "The rule to be derived from the decisions seems to be this: that cases are not considered as coming within the statute, when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute." Applying that rule to the present case, he said that although the effect of the discontinuance of the action was to discharge the attachment, yet that was incidental only; and the leading object and purpose were the relief and benefit of the father, and not of the defendant. "It does not appear," he remarked, "that the son had any interest in the estate released, or object or purpose of his own to subserve." It was therefore the ordinary case of a son becoming surety for his father's debt, in consideration of forbearance; and therefore, not being in writing, it was within the statute.(c)

(c) The principle that the surrender by the promisee of a lien upon property, or other security for the payment of the debt, will take the promise

§ 597. But the question received such a thorough discussion, and the rule now recognized was so ably sustained, upon principle and authority, in *Mallory v. Gillett*, 21 New York, 412, (d) decided in the Court of Appeals of that State, A. D. 1860, that it may be regarded as having been set at rest by that decision. There the plaintiff, at the request of one Haines, had taken upon his dry dock a canal boat, and put upon it repairs to the value of \$125; and having a lien upon it for the repairs, he refused to deliver it to Haines or any other person, till that amount should be paid; whereupon the defendant, in consideration of the delivery of the boat to Haines, verbally promised the plaintiff to pay the amount due for repairs. The boat was thereupon delivered to Haines, and the defendant paid the plaintiff \$50, and refused to pay the residue; whereupon this action was brought to recover upon the promise. The defendant succeeded in the court below, upon his objection that the promise was within the statute of frauds; and the plaintiff appealed to the Court of Appeals, where the judgment of the Supreme Court was affirmed by a vote of five judges against three. The opinion of the majority, delivered by Comstock, C. J., from which quotations have been frequently made in previous portions of this volume, covers upwards of twenty pages of the printed report; and notwithstanding that it is fairly open to criticism, upon some of the collateral points discussed by him, we exaggerate nothing in saying that upon the whole, it surpasses in clearness and precision of language, force of reasoning, and discriminating criticism of previous adjudications, any judicial determination ever delivered upon this branch of the statute of frauds. The most meagre outline of the argument is all that our limits permit us to give in the sub-

out of the statute, only when the defendant acquired what was surrendered, was also clearly stated in *Curtis v. Brown*, 59 Massachusetts (5 Cushing,) 488, A. D. 1850; *Dexter v. Blanchard*, 93 Massachusetts (11 Allen), 365, A. D. 1865; and *Burr v. Wilcox*, 95 Massachusetts (13 Allen), 269, A. D. 1866.

(d) *Affirming S. C.*, 23 Barbour, 610.

joined note.(e) It will appear therefrom that the decision, as in *Nelson v. Boynton*, was put distinctly upon the ground that the defendant had no personal interest or

(e) After demonstrating very clearly, upon principle, that the question under the statute can never arise, unless there is a new and sufficient consideration, because, without such a consideration, a promise to pay the precedent debt of another will be void at common law; that the question under the statute is always whether there was a debtor and a surety, not when the debt was created, or what was the consideration of the collateral promise; that the validity of a verbal promise under the statute does not depend upon the comparative merits of the different kinds of consideration upon which it may be founded, all considerations being in that respect on an equal footing; and therefore that if the release of a security to the debtor takes out of the statute a stranger's promise to pay the debt, the same result must inevitably follow with respect to any promise, the subject of which is a third person's antecedent debt; the learned Chief Justice proceeded to examine critically the classification in *Leonard v. Vredenburg* (ante, § 63), which he thought was strictly correct, although it had been misapprehended. Regarding, he said, the connecting remarks of Chief Justice Kent, it will appear that the present case belongs to the second class, and not to the third; because although both of them are promises to pay a third person's antecedent debt, the second expressly includes cases where the undertaking is subsequent to the creation of the debt, and founded upon a further or new consideration; and if this case be put within the third class, there will be no second class left. The distinction between the second and the third class is not in the nature of the consideration, but in respect to the persons between whom it moves; in the former it moves to the debtor, and may consist of any thing of benefit to him or harm to the creditor, in which the new promisor has no concern; in the latter, however, it moves to the new promisor; "and that also," he added, "as in all other cases of contract, may consist of benefit to him, or harm to the party with whom he is dealing." The language of Savage, C. J., in *Farley v. Cleveland* (ante, § 553), is more exact than that of Chief Justice Kent, in requiring the consideration to move to the promisor; and more comprehensive, because it includes cases where the consideration moves from the original debtor, as for instance, where the latter places a fund in the hands of the promisor, in consideration of his promise to pay the debt. But the difference is not one of principle, whether the promise was made to the debtor or to the creditor; because in the former case it moves from the creditor through the debtor to the promisor. The learned Chief Justice then proceeded to analyze the previous New York cases in detail, arguing with great ingenuity, although, we think, not always successfully, that in all of them where a verbal promise had been sustained the consideration moved to the promisor, and was a matter in which he had a per-

concern in the property, the release of which formed the consideration of the promise. On the other hand, Bacon, J., speaking for the minority of the court, delivered an opinion nearly as elaborate, in favor of the reversal of the judgment; sustaining with great ingenuity the proposition advanced by him, that the cases in New York and England establish the rule, that a promise is not within the statute, "where the creditor, in consideration of the promise, surrenders some pledge, or relinquishes some lien actually held by him and capable of enforcement, and by means of which the original debt was rendered secure," irrespective of the question to whose benefit the surrender enured. The principles established by this case were reaffirmed by the same court in *Becker v. Torrance*, 31 New York, 631, A. D. 1864; *Pfeiffer v. Adler*, 37 New York, 164, A. D. 1867; and *Brown v. Weber*, 38 New York, 187, A. D. 1868; all of which are cited elsewhere more at length.

sonal interest or concern; and in all those where it was held that a verbal promise was not valid, the consideration moved exclusively to the debtor. The cases cited and commented on by him, which are relevant to the present inquiry, have been cited, with one exception, in the preceding pages, in connection with other rules. Those where the verbal promise was said to have been sustained, because the consideration was beneficial to the promisor, are *Skelton v. Brewster*, 8 Johnson, 293; *Gold v. Phillips*, 10 Johnson, 412; *Myers v. Morse*, 15 Johnson, 425; *Olmstead v. Greenly*, 18 Johnson, 12; *Farley v. Cleveland*, 4 Cowen, 432; *Chapin v. Merrill*, 4 Wendell, 657; *Gardiner v. Hopkins*, 5 Wendell, 23; *Ellwood v. Monk*, id. 235; *King v. Despard*, id. 277; and *Meech v. Smith*, 7 Wendell, 315. The principle was the same, the learned Chief Justice said, where a note or other evidence of indebtedness of a third person, held by the promisor, was transferred by him to the promisee, with a guaranty of payment, as in the cases which are cited in article i of chapter xviii. *Slingerland v. Morse*, 7 Johnson, 463; *Mercein v. Andrus*, 10 Wendell, 461; *Simpson v. Patten*, 4 Johnson, 422; and *Jackson v. Rayner*, 12 Johnson, 291, were also cited and commented on; we have given the substance of most of his remarks upon those cases in the notes thereto, where they were previously cited; but although some of the dicta point to a different conclusion, none of them, he contended, decides any thing hostile to this principle. One case he excepted from these remarks; namely, *Fay v. Bell, Hill and Denio*, 251; there the defendant's verbal promise to pay the debt, in consideration of the surrender

§ 598. The case of *Nelson v. Boynton* was referred to with approbation in two Kentucky cases, *Jones v. Walker*, 13 B. Monroe, 356, A. D. 1852, and *Lieber v. Levy*, 3 Metcalfe, 292, A. D. 1860, in each of which a verbal promise of the defendant to pay a debt due to the plaintiff by a third person, was held to be void; the consideration, in the former case, being that the plaintiff would not issue an attachment to collect it; and in the latter, (where the promise was to pay fifty cents on the dollar,) that the plaintiff would release a levy, under an attachment, upon goods of the debtor sufficient in value to pay the debt, and discontinue the attachment proceedings.

§ 599. The same principles were also approved in *Corkins v. Collins*, 16 Michigan, 478, A. D. 1868. There the action was brought on a verbal promise to pay for board furnished and money loaned by the plaintiff to one Sykes;

to the debtor of property on which the plaintiff had a lien was sustained; but the case was erroneously decided. *Van Slyck v. Pulver*, id. 47; *Smith v. Ives*, 15 Wendell, 182; *Packer v. Willson*, id. 343; and *Watson v. Randall*, 20 Wendell, 201, are examples of cases where the consideration moved to the debtor and the promise was therefore held to be within the statute. *Barker v. Bucklin*, 2 Denio, 45, and *Kingsley v. Balcome*, 4 Barbour, 131, contain definitions which bring the promise in question within the statute. *Nelson v. Boynton*, 44 Massachusetts (3 Metcalf), 396, and the series of English cases cited in the foregoing article, were also examined in detail and commented upon; and with respect to those where the verbal promise was sustained, the learned Chief Justice said: "In each of them the creditor relinquished some lien or advantage incident to his debt; but in each of them whatsoever he relinquished was acquired by the defendant, either as a matter of personal interest and concern to himself, or to other parties whom he represented; and on that consideration he promised to pay. In none of them was any such doctrine asserted, as the plaintiff contends for in this case. In all of them the engagement was deemed original, either because the primary debt was gone, or because the consideration moved to the promisor; and in some of them the decision was put on both these grounds." And after examining and discussing *Read v. Nash*, 1 Wilson, 305; *Goodman v. Chase*, 1 Barnewall and Alderson, 297; and *Fish v. Hutchinson*, 2 Wilson, 94, the learned Chief Justice concluded with the observations, including his classification, which have been copied at length, ante, § 64.

and the consideration of the promise was the release of certain trunks belonging to Sykes, upon which the plaintiff claimed, (and in the opinion it was assumed,) that he had a lien for the payment of the debt. At the trial the judge directed a verdict for the defendant; and the judgment thereon was affirmed by the Supreme Court, on the ground that the property was released for the benefit of Sykes. The rule is thus stated by Campbell, J., delivering the opinion of the court: "When, by the release of property from a lien, the party promising to pay the debt is enabled to apply it to his own benefit, so that the release enures to his own advantage; it is quite easy to see that a promise to pay the debt, in order to obtain the release, may be properly regarded as made on his own behalf, and not on behalf of the original debtor; and any possible advantage to the latter is merely incidental, and is not the thing bargained for. That promise is therefore, in no proper sense, a promise to answer for any thing but the promisor's own responsibility, and need not be in writing." "But where the entire transaction, both promise and consideration, is intended and operates exclusively for the advantage and on behalf of the debtor whose debt is guarantied, there seems to be no plausible ground for holding that the promise is any thing but collateral; and if such a promise can in any case be valid without a writing, it must be valid in all. There is no tangible middle ground. Among valuable considerations, there are no degrees of validity. They are all good or bad; but one valid one is as high in rank as another."

§ 600. It was held in the very recent case of *Landis v. Royer*, 59 Pennsylvania, 95, A. D. 1868, that the rule is satisfied if the lien or charge upon the defendant's property was only inchoate, provided it could have been made perfect; and at the same time the court assigned a reason for the decision, corresponding very closely with the English doctrine in this class of cases. This action was brought to recover the value of a quantity of lumber, used in constructing a house for the defendant. It appeared

at the trial that the defendant, his brother, and another person, had severally entered into contracts with one Wertz; whereby Wertz was to erect a house for each of them, he furnishing all the materials. The plaintiff had supplied lumber for all the houses, and had charged it to Wertz, without designating for which house each parcel of lumber had been supplied. Wertz became unable to pay; and the evidence tended to show, that thereupon the defendant and his brother agreed with the plaintiff upon the value of the lumber, which had gone into each of the three houses; and each of them agreed to pay his share, provided the third contractor would pay the residue of the account; and that the latter had subsequently done so. The judge left it to the jury to determine whether the lumber was furnished upon the credit of Wertz alone, or on the credit of the defendant, or his building; instructing them that the building, if the lumber was furnished on its credit, would have been subject to a lien therefor (under the mechanic's lien law); and that although no lien had been entered, the promise would be to pay the defendant's own debt, and in ease of his own property, and not the debt of Wertz. The jury having found a verdict for the plaintiff, a judgment thereon was affirmed. Sharswood, J., delivering the opinion of the court, said, in answer to the objection that the promise was within the statute of frauds: "It was the debt of the defendant's own building, the payment of which could be legally enforced against it; though it may not have been personally his debt, his property was answerable for it, and his engagement to pay was in relief of his property."

§ 601. Sometimes this principle will save a verbal promise to pay a debt due by another, when the surrender of the lien was only constructive. That seems to have been the ground of a recent decision in the New York Common Pleas, *Benedict v. Dunning*, 1 Daly, 241, A. D. 1862. There one Schoonmaker had employed the plaintiffs to make searches respecting the title to certain property, with the view of borrowing a sum of money upon a mortgage

on the property ; the plaintiffs also agreeing to use their influence to procure for him the said loan, which, it is to be plainly inferred, they controlled as attorneys for the proposed lender. The plaintiffs made the necessary searches, but Schoonmaker was unable to fulfil the agreement on his part for the loan. The defendant held a third mortgage upon the same property, and a decree had been made in an action to foreclose the second mortgage. The defendant wishing to procure the same money which Schoonmaker proposed to borrow, for the purpose of paying off the two prior mortgages, it was thereupon verbally agreed between him and the plaintiffs, that they would cause that money to be loaned to him upon the property, and would make a further search as to the foreclosure proceedings, and cause the money to be kept for him, until it was ascertained whether he would become the purchaser upon the sale under the decree ; and on the other hand, he agreed to take the loan, and pay them for their services and expenses in making all the searches, provided he became the purchaser upon the sale. The searches were completed, and the defendant became the purchaser ; but he refused to take the loan or to pay the plaintiffs. A judgment in favor of the plaintiffs was affirmed upon appeal. Brady, J., delivering the opinion of the court, said that Schoonmaker was liable to the plaintiffs, but the defendant assumed the responsibility, in consideration of the transfer to him of the subject matter of the liability ; and that he was to receive the benefit of the services rendered and expenses incurred for Schoonmaker. The loan was the consideration of both promises. The defendant's promise, added the learned judge, "was a new promise, to the effect that if the plaintiffs would transfer the loan to him, he would pay them the same charge, that they would receive from Schoonmaker, had the loan been made to him." The defendant also agreed to pay the charges for the additional services necessary to make the transfer in due form. "The money was ready," continued the learned judge, "and was kept in abeyance, awaiting the convenience of the defendant

and subject to his order. This was a further consideration for the promise." The learned judge therefore thought that this case was within the principles laid down in *Mallory v. Gillett*. (f)

§ 602. The question, whether the cotemporaneous discharge of the lien must necessarily form the consideration of the promise, in order to bring the case within the rule, was considered, although under circumstances unfavorable to its definite settlement, in *Plummer v. Lyman*, 49 Maine, 229, A. D. 1860. There the plaintiffs had a lien, under the State law, on a vessel which one Spear had built, for materials furnished towards her construction; and the defendants, who had made large advances to Spear, had or claimed to have the legal title to the vessel, by transfer from Spear. Shortly before the plaintiffs' lien would expire, one of the defendants said to one of the plaintiffs, that they did not wish the vessel to be attached under the lien; and if the plaintiffs would obtain Spear's order upon them for the amount of this claim, they would accept it. The plaintiffs thereupon procured such an order

(f) If this decision can be sustained under the rule mentioned by the court, it would seem that Schoonmaker must have been a consenting party to the arrangement; and that the true ground is that the plaintiffs' agreement was in legal effect a promise, with Schoonmaker's consent, to hold the searches and official certificates of title as the attorneys for the defendant, surrendering to him their lien thereupon for the amount of their bill. Unless Schoonmaker participated in the arrangement, it is difficult to see what connection there was between the defendant's contract and his liability. On the contrary it would seem that this was an independent agreement, to pay a certain sum for services to be rendered to the defendant himself, which the plaintiffs were none the less qualified to perform because they had investigated the same subject for another person. The amount to be paid by the defendant was fixed by reference to the sum due from Schoonmaker; doubtless on account of the improbability that the plaintiffs could collect any thing from the latter, whose property had been swept away by the foreclosure. Still, except upon the hypothesis that he was a party to the new transaction, the plaintiffs could have recovered against him, after fulfilment of the defendant's promise; and on the other hand, he would not be liable over to the defendant for whatever the latter might pay in fulfilment thereof.

and gave Spear a receipt in full ; but the defendants refused to accept the order. There were two days then remaining, before the lien would expire, and the plaintiffs at once took out process to enforce it ; but before they could serve the process, the vessel had left port. In an action upon this promise, the evidence was reported to the court for an opinion ; and after argument, it was adjudged that the plaintiffs be nonsuited. The opinion, delivered by Tenney, C. J., placed the decision upon the ground of want of consideration, as well as because the promise was within the statute ; there being, he said, no proof that the discharge of the lien was the consideration of the defendant's promise ; or that the plaintiffs promised to discharge it, or to give Spear a receipt. And he added that the plaintiffs were not injured by the refusal to accept the order ; as their rights and remedies were precisely the same as if the order had never been given.

§ 603. It is believed that the general doctrine of the foregoing cases may now be regarded as an established rule of American jurisprudence. In some of the States there are decisions, which it may be difficult to overrule, in favor of the doctrine that the surrender of a lien or other available security for the payment of a debt, will take a promise out of the statute, without regard to the person to whom it was surrendered ; but this proposition is intrinsically so unsound, and the stream of authority is now running so uninterruptedly the other way, that doubtless, when the necessity arises, the courts of those States will follow the example of the highest court of New York, and by sweeping away precedents which cannot be reconciled with the foregoing rule, render the American decisions uniform on this point.(g)

(g) The case of *Allen v. Thompson*, 10 New Hampshire, 32, decided A. D. 1838, is one of the precedents referred to. There the declaration counted upon a promise of the defendant, made in consideration of the delivery to one Bryant, of the account book of one Richardson, who had delivered the same to the plaintiff as a pledge, to secure the payment of a debt owing by Richardson ; the averment being that it was delivered to

§ 604. No case appears to have yet arisen, necessarily involving an answer to the question, whether a cotemporaneous surrender of the lien is indispensable to the validity of the verbal promise. But although the Chief

Bryant "to collect the amount due on the book;" and the promise was that the defendant would pay the debt due to the plaintiff, provided Bryant should not collect enough for that purpose. At the trial the plaintiff introduced evidence tending to prove a verbal promise, as alleged in the declaration; and the judge ruled as matter of law that it was not within the statute, and the plaintiff had a verdict. On a motion for a new trial the ruling was sustained; the court remarking that it did not appear why the defendant wished the book to be delivered to Bryant, whether to benefit Richardson, Bryant, or himself, but that was unimportant. The plaintiff parted with a book which he possessed, and from which he had a right to pay himself, and the consideration of the promise was the surrender of the book, and not the debt due by Richardson. This distinct consideration was one which passed between the parties to the new contract, as the delivery of the book to Bryant was in legal effect the same as a delivery to the defendant, and it was sufficient to take the case out of the statute. In *French v. Thompson*, 6 Vermont, 54, A. D. 1834, the court seem to have regarded the mere surrender of a security as sufficient to take out of the statute a promise to pay the debt; but in fact the surrender was made to the defendant, although he received the property surrendered in a representative capacity; namely, as guardian for an infant, whose estate was primarily liable. In South Carolina a verbal promise to pay the tavern bill of a third person, in consideration of the surrender to him of his trunk, upon which the landlord had a lien for his bill, was sustained on the ground that where "a complete and enforceable lien on the property of the debtor," is given up, in consideration of the promise, it is not within the statute. *Dunlap v. Thorne*, 1 Richardson, 213, A. D. 1845. However there was some question whether the plaintiff had not discharged the original debtor; and the prevailing opinion refers to that feature of the case, as being important, although it is not assigned as a separate reason for the decision. The cases cited from the South Carolina reports were *Jones v. Ballard*, 2 Mills, 113; *Adkinson v. Barfield*, 1 McCord, 575; *Rogers v. Collier*, 2 Bailey, 581; *Barnstine v. Eggart*, 3 McCord, 162; *Boyce v. Owens*, 2 McCord, 208; *Corbett v. Cochran*, 3 Hill, 41. To which might be added *Siau ads. Pigott*, 1 Nott & McCord, 124. And it was asserted that this was the rule of law, although it was indefensible upon principle, in *Durham v. Arledge*, 1 Strobhart, 5, A. D. 1846, where, however, there was no occasion to apply the rule, as the promise was void upon every theory, having been made in consideration of forbearance to issue an execution. See also *Hindman v. Langford*, 3 Strobhart, 207, A. D. 1848. Most of those cases are cited in previous pages of this volume. It is believed that the only case, during the

Justice in delivering his opinion in *Fitzgerald v. Dressler*, (h) treated the question, as if it was a matter of course that the surrender would form the consideration of the promise, it is quite clear that he did not intend to make any ruling, to the effect that this was an indispensable requisite. On the contrary, he said several times, that the previous liability of the defendant's property for the debt, was the true reason why the statute did not apply. And the expressions containing a similar implication, which are found in the American cases, may perhaps be regarded as dicta, rather than adjudications. The distinction is of little practical importance in this class of cases; but it has an important bearing upon several questions, connected with the effect of the consideration upon the application of the statute; and especially upon the principal question to be discussed in the next chapter. If, as the English authorities apparently hold, and as correct principles seem to demonstrate, the true reason why the statute does not apply, is that the debt of the promisor's property is practically his own debt, it is evident that his motive in assuming an absolute liability to pay it is of no importance.

last twenty years, where the doctrine of *Nelson v. Boynton*, was not followed, is *Spooner v. Dunn*, 7 Indiana, 81, decided A. D. 1855; where the court appears to have been unconscious of that decision, or of the principle which it establishes. There it was held by the Supreme Court, on appeal, that the relinquishment of a levy made under an execution, upon property sufficient in amount to satisfy it, would sustain the defendant's verbal promise to pay the debt, although the defendant personally derived no benefit from the transaction. The decision was placed entirely upon the ground that "where a specific lien or substantial benefit is surrendered, upon the express promise of a third person to pay a debt, it is an original undertaking, and not within the statute." But it is stated in the report that the promise was in consideration that the plaintiff "would release his levy and return the executions," and that he did so; from which it may be inferred that the debt was discharged, in consideration of the defendant's promise.

(h) Ante. § 590, 591.

CHAPTER SEVENTEENTH.

A DEFENCE OF THE REJECTION, AS UNSOUND, OF ALL
LEGAL PROPOSITIONS DEPENDENT UPON THE CASES
CITED IN THE LAST TWO CHAPTERS, EXCEPT THOSE
EMBODIED IN THE SEVENTH AND EIGHTH RULES.

§ 605. Having thus defined the rule which governs the cases, where the debt, for which the promisor undertook to answer, was secured by a lien upon property, existing in favor of the promisee; and ascertained, as far as the present state of the authorities permits, the principle upon which it depends; we have now to defend the conclusions which we have adopted, in treating these cases, and those governed by the seventh rule, as two distinct and independent classes; and in rejecting various other legal propositions which have the sanction of the most respectable authorities. In so doing, we shall be compelled partly to retrace our steps, and again to travel over some of the ground, covered by the discussion contained in the two foregoing chapters.

ARTICLE I.

Examination of the prevalent theories derived from Williams v. Loper, and kindred cases.

§ 606. The cases collected in the first article of the sixteenth chapter, seem to be generally regarded as belonging to one class; although the connection of some of them with the rest is not very apparent; and with the exception of the last two or three, the principles which controlled the decision of those, where the promise was excluded from the operation of the statute, are very obscure. They have formed the subject of a discussion, which has lasted for many years; and, so far from having resulted in any settled conclusion, it is even now at its height. There is

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no prospect of its ever being brought to a satisfactory termination, except by its abandonment; probably because all the remarks of the judges, and perhaps all the decisions, are not capable of being fully reconciled with each other, or with the true construction of the statute. It is evident that the principle that the promise is not within the statute, when the property of the promisor was already liable for the debt assumed by him, affords but a very imperfect explanation of many of the cases; and the subject of the controversy is to ascertain, what additional principles, if any, are to be derived from them. We append in a note, extracts from the works of some of the leading English and American elementary writers, which will show how great a stumbling block, in that respect, they have been found to be, by the commentators in both countries.(a)

(a) Mr. Roberts in his *Treatise on the Statute of Frauds*, page 232, lays down the rule, as derived from such of the cases as had been decided at the time of the publication of his work, as follows: "It is to be observed, in regard to these promises founded on the liability of another person, that to constitute them such as are necessary by virtue of the statute of frauds, to be committed in writing, the consideration should appear to have an immediate respect to the liability of the party promised for. If it spring out of any new transaction, or move to the party promising upon some fresh and substantive ground of a personal concern to himself, the statute of frauds does not attach upon such promise, but the same may be good, if the consideration be sufficient, although existing in parol only." It will be noticed, that if the word "and" had been used in the place of "or," in the second sentence, the principle asserted would have been very nearly equivalent to the doctrine, that the promise is not within the statute, when the leading object of the promisor was to benefit himself, which has obtained an extensive recognition in the United States. Other English writers use nearly equivalent expressions; and some fall into the error of supposing that the ground of such of the decisions as sustained the verbal promise, where the consideration was the surrender of a lien in favor of the promisee, turned upon the nature of the consideration, instead of the relation of the promisor to the property to which the lien attached. Thus in *Burge on Suretyship*, p. 26, it is said: "The debt of another may have been the original cause of the promise, yet if the person to whom it is given relinquish some right or advantage which he possessed, and which might have enabled him to obtain satisfaction of his debt, the promise by a third party to pay the debt, in

§ 607. With respect to the various legal theories, which the courts and text writers in the United States have derived from these cases, through subsequent adjudications in this country, they seem at the present time to be embodied in four distinct and conflicting propositions, each of which finds able and distinguished advocates. These are: *First*. That whenever a verbal promise to pay the debt of a third person has been taken out of the statute, upon the authority of the cases of this series, the true ground of the decision was that the leading object of the promisor was to benefit himself, and the debtor's discharge resulted only incidentally from the fulfilment of the promise. *Secondly*. That whenever such a promise was sustained, the decision proceeded upon the ground that it was to be fulfilled, out of a fund, proceeding either from the creditor or from the debtor. *Thirdly*. That some of the decisions, sustaining

consideration of such relinquishment, is an original promise." And apparently Mr. Theobald, in his Treatise on Principal and Surety, pl. 58, agrees with this statement of the rule. In Mr. Fell's work on Guaranty and Suretyship, p. 16, the principle of these cases is stated to the same effect, as follows: "A party may make himself liable to the same demand to which another person is already subject, without a note in writing, in many cases; provided there is a new and adequate consideration arising between him and the original creditor." Then after citing *Williams v. Leper*, *Castling v. Aubert*, and *Love's case*, to show what is a new and adequate consideration, it is added, on p. 18: "In these three cases the plaintiff, creditor, had possession of the property of the debtor, and a lien upon it, which he was induced to give up by the promise of the defendant." The other cases do not appear to have been cited. And in *Leigh's Nisi Prius*, 1031, the result of the cases is thus summed up: "Although the decisions on this subject can scarcely be deemed conflicting, yet it is difficult to lay down any rule with which all the authorities can be reconciled. The inference, however, from the preceding decisions is, that though the debt of a third party be the subject matter of a promise, yet if the promise be founded on a new and distinct consideration co-extensive therewith, and moving, not to the third party, but to the person who makes the promise; or if the third party be not liable to be sued on the debt, when the promise is made, it is not within the statute." Mr. Addison in his Treatise on Contracts, 104, is even more inexact. He says: "If the plaintiff, for example, has a lien upon the goods and chattels of his debtor in his possession, or if he holds securities for the payment of his debt, and is induced either to give up his lien upon the goods

the verbal promise, rested upon the first ground, and some upon the second ; so that both of these propositions ex-

or to part with his securities, upon the faith of a promise, made by the defendant, to pay the amount of the plaintiff's claim thereon ; the promise so made is not within the mischief intended to be provided against by the statute of frauds, although the amount promised to be paid, as the consideration or inducement, for the abandonment of the lien or the surrender of the securities, may be the subsisting debt of a third party, due to the plaintiff ; and the performance of the promise may have the effect of discharging that debt." Although this proposition at one time received considerable countenance in the American courts, it cannot be sustained on any correct view of the English cases ; but it has been retained in the subsequent editions of Mr. Addison's book, and is to be found again in the sixth, published in 1869, on page 60. But on the preceding page the editor, Mr. Cave, without citing any authorities, lays down a general rule in these words : "Where the defendant, in order to get rid of an incumbrance on his own property, or to obtain some direct personal advantage to himself, promises to pay the debt of another, the promise is not within the statute." In the third (English) edition of Chitty on Contracts, p. 511, the cases which had been decided up to that time are cited with the following remarks : "Although the debt of another form the subject matter of the defendant's undertaking, still, if he promised to pay the debt upon some new consideration raised by himself, and the consideration be the creditor's resignation of a charge or lien on goods which afforded him a remedy or fund to enforce payment, the case does not fall within the statute." The word "raised" is evidently a printer's blunder for "received ;" correcting this error, the sentence expresses with tolerable accuracy the rule to be derived from the lien cases. But the blunder is continued in all the later editions, and in the eighth, published in 1868, on page 480, this remark is prefaced with : "It has also been said that," and after citing *Williams v. Leper*, *Bampton v. Paulin*, *Edwards v. Kelly*, *Barrell v. Trussell*, *Castling v. Aubert*, *Thomas v. Williams*, and *Houlditch v. Milne*, the editor condemns all those of the series, in which a verbal promise was sustained, in the following sweeping terms : "But, as has already been observed, the real question in such cases would now appear to be, not whether the promise of the guarantor was given on a new consideration, but whether by accepting his liability, the party to whom the promise was given has relinquished his claim on the party originally liable. And accordingly it may be questioned, whether any case similar to those above cited, would now be held not to be within the statute ; unless it appeared that the promisee, by giving up his lien or charge on the property of the party originally liable, had left himself wholly without a remedy against him." And in this edition, *Fitzgerald v. Dressler*, *Gull v. Lindsay*, and other modern cases are cited on page 476, in connection with a quotation from the end of the note in 1 *Williams's*

press correct rules of law. *Fourthly.* That in this series there are two distinct classes of cases, practically if not

Saunders, which erroneously omits the important words, "or his property." Mr. John William Smith, in his *Lectures on the Law of Contracts*, pp. 46 and 47, apparently agrees with the modern editor of Chitty in the opinion that the cases are no longer law, for he does not cite or refer to them, but says: "It was at one time thought that a verbal promise, even to answer for the debts of another, for which that other remained liable, might be available, if founded on an entirely new consideration, conferring a distinct benefit upon the party making such promise. This idea is however confuted by Serjeant Williams in an elaborate note to the case of *Forth v. Stanton*, which I have already cited; and the rule there laid down by him, and which has ever since been approved of, is, that the only test and criterion, by which to determine whether the promise needs to be in writing, is the question whether it is or is not a promise to answer for a debt, default or miscarriage of another, for which that other continues liable. If it be so, it must be reduced to writing; nor can the consideration in any case be of importance, except in such cases as *Goodman v. Chase*, in which the consideration to the person giving the promise, is something which extinguishes the original debtor's liability. You will see Serjeant Williams's criterion approved of in *Green v. Cresswell*, 10 A. & E., 453, and *Tomlinson v. Gell*, 6 A. & E., 564." However, the English editor of this work adds a note, in which he makes the very proper criticism on this passage, that the note to Williams's Saunders requires an absence of liability on the part of the defendant's property, as well as an absence of personal liability, except such as arises from the promise, in order to bring the promise within the statute; and that the cases where the guarantor has an interest in his promise, have given rise to some conflict of opinion, which is solved by that observation. That part of the original note to *Forth v. Stanton*, 1 Williams's Saunders, 211, which bears upon this question, is as follows: "But where the promise is founded upon some new consideration, sufficient in law to support it, and is not merely for the debt, etc., of another, such an undertaking, though in effect it be to answer for another person, is considered as an original promise, and not within the statute; as where A promises B to pay him a sum of money, in case he will withdraw his record in an action of assault and battery," citing *Read v. Nash* (ante, § 130), *Stephens v. Squire* (ante, § 484), and *Williams v. Leper* (ante, § 577). But in the additional notes of Mr. Justice Patteson and Mr. Justice Williams, in the fifth and sixth editions, several of the leading cases on this subject are cited and commented upon; and it is said that in *Williams v. Leper* the true ground of the decision was that the defendant was the owner of the goods; that in *Houlditch v. Milne* (ante, § 579), the circumstances showed that all the credit for the repairs was given to the defendant, and the real owner of the carriages was not

expressly recognized, and only two, wherein the statute does not apply; the one being where the promise was

liable; and that in *Castling v. Aubert* (ante, § 580), and *Anstey v. Marden* (ante, § 118), there was a purchase of an interest. The note concludes as follows: "There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be, that the question whether each particular case comes within the statute or not, depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise." This conclusion is now generally recognized in England as containing the correct rule. (See *Fitzgerald v. Dressler*, ante, § 590). In the thirteenth English edition (A. D. 1869) of *Selwyn's Nisi Prius*, edited by Messrs Keane and Smith, volume 2, page 773, the editors lay down with correctness the principle to be deduced from the English lien cases; but it may be questioned whether they give the correct reason therefor. The passage is as follows: "There is, however, a remarkable class of cases, in which a promise to answer for the debt of another, having been coupled with the purchase by the guarantor of an interest of some kind, or the surrender *in his favor* of a right, such as that of distress, has been held not to be within the statute; and in these cases it is not essential that the original debt should be extinguished. The principle on which these cases depend, appears to be that the main object of the transaction has been to effect something entirely distinct from the payment of the debt of the third person; and that such payment, though a consequence, is not yet the direct object of the transaction." But such is certainly the direct object of the transaction and the only object of the promisee; although the promisor may also have some other object in view. Then after citing and commenting upon most of the cases collected in the foregoing article, it is said (p. 776) that the decisions relative to the liability of a *del credere* factor rest upon the same principle, and the case of *Couturier v. Hastie* (cited in chapter xviii), is given at length, with the following comment: "From the reasoning in the above judgment, may be deduced the true limits to an opinion, which appears at one time to have prevailed, that a contract, if founded on a new consideration, is not within the statute. Now it is plain that a promise to pay the debt of another, founded on the antecedent debt alone, is *nudum pactum*; and therefore wherever such contract is to answer for an old debt, there must be a new consideration. It may, perhaps, therefore be safely laid down, that wherever the principal object of the transaction is to secure the debt of another, as in the case of an advance to A on the guaranty of B the case will be within the statute; and that the only cases in which the nature of the consideration is material, are such as those in the class above mentioned, in which the guaranty is only a secondary matter." In 3 Par-

to be fulfilled out of a fund ; the other where the debt was a charge or lien upon the promisor's property.

sons on Contracts, fifth edition, page 24, it is said : "It may indeed be stated as a general rule, that wherever the main purpose and object of the promisor is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute; although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the liability of another. There are several classes of cases, which may perhaps be more satisfactorily explained upon this principle than upon any other. Thus if a creditor has a lien on certain property of his debtor to the amount of his debt, and a third person, who also has an interest in the same property, promises the creditor to pay the debt, in consideration of the creditor's relinquishing his lien, this promise is not within the statute. The performance of the promise, it is true, will have the effect of discharging the original debtor; but there is no reason to suppose that this constituted in any degree the inducement to the promise, or was at all in the contemplation of the promisor." Mr. Story, in the fourth edition of his work on Contracts, § 1015, h, says: "So where the incidental effect of the promise is to pay the debt of another, yet if the leading object of the special promisor be to subserve some purpose of his own, it is not within the statute." The meaning is evidently that such is the rule, where the incidental effect of *fulfilment* of the promise is to pay the debt of another; for its discharge in consequence of the promise, would bring the case within the fourth rule. (Ante, chapter ix.) Mr. Browne in his Treatise on the Statute of Frauds, second edition, § 212, states the rule as follows: "That whenever the transaction between the parties is such that the primary and distinctive obligation assumed by the defendant is different from that of a guarantor, although as incidental to, and in the course of, the discharge of that obligation, the debt of another is satisfied, the defendant's promise is not within the statute." The authors of the American notes to Smith's Leading Cases, volume 1, page 483, of the sixth edition, say: "Whenever the consideration for a promise to pay a debt, for which another is answerable, moves to the promisor, and is sufficient to satisfy the requisitions of the common law, it will not be within the statute, merely because it is in terms for the antecedent or cotemporaneous debt or default of another, or because a third person is answerable for the fulfilment of the obligation assumed by the promisor." Several American cases are then cited, and the note proceeds: "These cases show, and it would seem sufficiently plain on principle, that when the consideration for a promise moves to the promisor, or can justly be viewed as a benefit conferred upon, or service rendered to him, at his instance, he cannot escape from the performance of his obligation, on the ground that some one else is liable for its fulfilment, or that a debt which he has in fact made his own, is also the debt of

§ 608. The first of these propositions involves a denial of the principle governing the entire class of cases considered in the fifteenth chapter. In view of the decisions therein cited, where the existence of a fund proceeding from the debtor, in contemplation of which the promise was made, was held to be sufficient to prevent the application of the statute, on that ground alone; although in some of them there was no room for the supposition, that the leading object of the promisor was to benefit himself; the cases which maintain this proposition must be regarded as of local authority only, and not entitled to recognition, as exponents of a principle generally recognized in American jurisprudence.

§ 609. With respect to the second proposition, we remark that it involves an assumption, which cannot be justified upon a fair and reasonable construction of many of the cases; namely, that whenever there was no fund proceeding from the debtor, there was constructively a fund proceeding from the creditor. In those cases where the creditor surrendered a lien upon property, in which the promisor had an interest, the advocates of this theory regard the lien as the fund, and its surrender as the process by which the fund was furnished. But this is a very forced inference, and often diametrically opposed to the real facts. For in all the cases where the creditor's title was hostile to that of the promisor, and the promise was in general terms to pay the debt, it is entirely clear that in fact neither party

another person. For as under these circumstances, the promisor contracts for himself, and receives an equivalent for what he agrees to give, the promise is not, in any just sense of the term, a promise to pay the debt of another, although the extinction of another's debt may be one of its consequences." And further on: "But whatever be the sacrifice made or loss incurred by the creditor, it will not give validity to an oral promise by a third person to pay the debt, unless it confers a benefit on the promisor, of such a nature that the liability which he incurs can justly be called his, as distinguished from the assumption of the antecedent or cotemporaneous obligation of another. Even when the withdrawal or forbearance of a distress or execution, the dissolution of an attachment or the extinguishment of an incum-

voluntarily assumed a relation, by which one furnished and the other received any thing, to be specifically devoted to that purpose. On the contrary the promisor's only motive in assuming the debt was to rid himself of that which interfered with the enjoyment and power of disposition of his own property ; and the transaction was simply the compromise of an antagonistic claim of title.

§ 610. And while the principle which the English authorities now regard as having controlled those cases ; namely, that the property of the promisor was already liable for the debt ; does not in any degree militate against the idea, that the debtor furnished the fund, by his transfer to the promisor, it is more than irrelevant to, for it is actually inconsistent with the idea, that the surrender of the promisee's title was in effect the furnishing of a fund by him, from which to pay the debt. That doctrine amounts only to this ; that a person may transfer, by an oral promise, to his person and to all his property, a liability which previously rested upon part of his property only. But if the lien of the promisee was a fund furnished by him for the payment of the debt, it would seem to follow that the promisor was answerable only for its due appropriation ; and if it should appear that the value of the promisee's lien was in fact less than the debt, the promisor would be liable only for the amount actually received. And in fact this conclusion is distinctly stated, in connection with the idea that the promisee furnished a fund, in

brance, on the faith of a promise that the debt shall be paid, has resulted in the loss of the only effectual means of obtaining payment from the debtor, the statute will operate as a bar, unless it can be shown that the property thus released was the defendant's, or that he derived some benefit from the transaction of which the law can take cognizance." "The numerous dicta which may be found the other way, and to the point that an injury to the promisee will be equally effectual with a benefit to the promisor, cannot weigh against the plain meaning of the act, and the numerous decisions, establishing that where the defendant does not receive or profit by what the plaintiff relinquishes, the consideration, though ample at common law, will not sustain the promise unless reduced to writing."

some of the cases where such an inference was raised by the judges who put their opinions upon that ground. But no court in England or the United States would tolerate a defence, that the property fell short of the plaintiff's demand, in a case where the promise was made to settle a hostile claim.

§ 611. We have therefore rejected the first and second of the propositions just mentioned. But it must be understood that we do not deny the correctness of the doctrine, that the statute does not apply, where the creditor in fact furnished a fund for the fulfilment of the promise. It would be sufficient in any such case, in order to save the verbal promise, to show that it was not to be fulfilled out of the means of the promisor. But we have not found it necessary to place such cases within a distinct class, or to frame a rule adapted to them. For if a tangible fund was really furnished by the promisee, it will very rarely happen that any question can arise touching the application of the statute, of sufficient gravity to require a solemn adjudication; and where any such question arises, some one of the rules already stated will invariably be sufficient to solve it. In all such cases the attempt to falsify the facts, in order to accommodate a legal theory, is the only real source of perplexity.

§ 612. If these views are sound, it follows that the third and fourth propositions are to be examined together; as the correctness of the third depends entirely upon the question, whether it recognizes the true rule to be derived from those cases, where there was no fund proceeding from the debtor. To this question, the fourth proposition returns a negative answer. We have adopted this conclusion; not without great hesitation at first; but ultimately from a very clear conviction of its correctness. We think that a careful consideration of the subject will result in demonstrating, that no rule for the exclusion of cases from the statute, depending upon the leading object of the promisor, can be sustained upon principle, or the weight

of well considered adjudications. If we do not greatly err, the definition embodied in the favorite proposition on that subject, is merely a vague and loose description of certain classes of cases, possessing a common feature ; the existence of which is a mere accident, having nothing to do with the application of the statute.

§ 613. The proposition which we have thus undertaken to combat, is the successor of the doctrine constituting the definition of the third class of cases, as stated in *Leonard v. Vredenburg*,^(b) and now, we think, properly classed among the exploded theories. This doctrine, which holds that the statute does not apply, "when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm, moving between the newly contracting parties," makes the validity of the verbal promise depend, upon the existence of that which merely satisfies the common law definition of a valuable consideration, with the addition of the words "new and original." As the consideration must necessarily be new, whenever the promise is to pay the pre-existing debt of another, the first of these words adds little or nothing in the way of precision or amplification, to the common law requirements of a consideration. The word "original," although obscure in itself, is explained by reference to a preceding portion of the same opinion. It was doubtless intended as the equivalent of the expression, "independent of the debt," which had just previously been used by the learned Chief Justice ; meaning that the consideration must be something unconnected with the subsisting indebtedness, and not merely something growing out of it, as would be the case if the consideration consisted merely of forbearance to the debtor. But provided it was, in that sense "original," there seems to be no doubt that if it was any thing done at the request of the promisor, which involved either benefit to him or harm to the promisee, the language of the rule was satisfied.^(c)

(b) See ante, § 63.

(c) This conclusion is opposed to that which Comstock, C. J., reached, in

§ 614. It remains to be seen, whether the doctrine which has taken the place of Chief Justice Kent's third proposition is more defensible than its predecessor. This inquiry, which will be carefully prosecuted in the next article, will close this long, and, we fear, tedious, although necessary discussion.

ARTICLE II.

Discussion of the question whether the abstract proposition can be supported, that a promise to pay the debt of another is not within the statute, whenever the leading object of the promisor was not to discharge the debtor, but to subserve some interest of his own, distinct from the payment of the debt; and the consideration moved to him.

§ 615. If the proposition, which has succeeded to the popularity formerly enjoyed by Chief Justice Kent's third definition in *Leonard v. Vredenburg*, was to the effect that whenever the leading object of the *transaction* was not to make the promisor answerable for the debt, default or miscarriage of another, the promise is not within the statute, although the undertaking of the promisor incident-

that portion of his opinion in *Mallory v. Gillett*, 21 New York, 412, where he commented upon this doctrine, with a commendable effort to reconcile it with the principles now recognized. (See the abstract contained in the note to § 597, ante.) But, be it said with great deference to so high an authority, the concession which he was forced to make, that harm to the promisee is equally meritorious with benefit to the promisor, for the purpose of calling the rule into operation, completely neutralizes the effect of his ingenious argument. The qualification that it must always move to the promisor amounts to nothing, until some example shall be produced of mere harm to the promisee moving to the promisor, in any other sense than that it was incurred at his request. The proposition of Chief Justice Kent has uniformly been understood, as we construe it in the text, and it cannot be reconciled with the modern rulings. In the language of Strong, J., in *Maule v. Bucknell*, (post, §§ 621, 622,) "that this proposition is inaccurate, is almost universally admitted, and it practically denies all effect to the statute. It cannot be admitted for a moment, in the terms in which it was expressed." Grover, J., in his opinion delivered in *Brown v. Weber*, 38 New York, 187, repudiated the doctrine in language equally conclusive, if less emphatic. (See § 312, ante.) It was also substantially condemned in *Clapp v. Lawton*, 31 Connecticut, 95; *Eddy v. Roberts*, 17 Illinois, 505; *Kingsley v. Balcome*, 4 Barbour (N. Y.), 131; *Barker v. Bucklin*, 2 Denio (id.), 45; *Kelsey v. Hibbs*, 13 Ohio, N. S., 340; and *Durham v. Arledge*, 1 Strobbart (South Carolina), 5.

ally imposed such a liability upon him, its general correctness could not be disputed. (a) In the existing state of society, almost every executory agreement involves, to some extent, a responsibility for the acts of others; and an analysis of the component parts of many liabilities, constantly assumed in the course of ordinary business transactions, to which no one ever imagined that the statute of frauds has any application, would result in proving that they consist, in a great degree, of responsibilities of that character. Every contractor for the erection of a building, the construction of a railroad, or the like; every common or private carrier; every insurer against loss by fire, or the perils of navigation, assumes an engagement, which principally consists of a promise to answer for the defaults or miscarriages of others. But in cases of this character, neither party was primarily seeking to impose upon the promisor a responsibility for a third person; and his assumption thereof was an accidental, or, at most, an incidental consequence, of a common design to accomplish some other purpose.

§ 616. But the mere statement of the proposition, that the leading object of the *promisor* was to subserve his own interest, implies, not only that his responsibility for another was, or at least that it may have been, the leading object of the promisee, but also that it was *one* object of the promisor; or, in other words, that both parties contemplated that the engagement of the promisor should be superadded, as an additional security to the promisee, to the liability of the third person, which was meanwhile to continue in full force. If it be said that such cases are without the statute, this is practically tantamount to saying that no case is within the statute, if the consideration of the contract moved to the promisor; for no man enters into a contract, with the leading purpose of making himself answerable for another's debt, or of discharging

(a) See extract from the 13th edition of Selwyn's *Nisi Prius*, in note to § 606, ante, and remarks of Poland, C. J., in *Fullam v. Adams*, note to § 620.

the debtor ; his principal object being invariably to secure the consideration. Consequently the most undisguised contracts of guaranty must fall without the statute, provided a distinct consideration was paid for the guaranty ; a doctrine which will not only include guaranties of the payment of precedent debts, but those where the guaranty was made at the time when the principal contract was entered into ; as, for instance, if A sells goods to B, and at the same time C guaranties the payment of the price by B in consideration of a commission paid to him by A.

§ 617. We conceive that the extended recognition, which this proposition has obtained, is due to the frequency of cases where it practically coincides with the well settled principle, that the statute does not apply, when the substance of the promise is an engagement to pay the promisor's own debt, or a debt resting upon his property. Thus if the promisor held a fund, which he was bound in some other form, or to some person other than the promisee, to apply towards the payment of the third person's debt, it amounts to the same thing, whether we say that his promise to pay that debt was substantially a promise to pay his own debt, or that his leading object was to relieve himself from a liability resting upon him. So when the promisee surrendered a lien upon the promisor's property in consideration of his promise to pay the amount of the lien, in general we may say indifferently that the debt was substantially his own, or that his leading object was to rid his own property of an incumbrance. In these, and other instances which might be named, the two propositions merely express the same idea in different words. There are also some cases without the statute, where both propositions are true in fact, although they relate to different features of the transaction ; but the circumstances are such that it is easy to overlook the true reason why the statute does not apply. Thus where the promisor had once been liable to pay the debt, and had been only technically discharged, a renewal of his engagement is a promise to pay his own debt ; and if it was founded upon a

new consideration beneficial to him, his leading object was to acquire the consideration. But in such a case, it is not true that either proposition may be indifferently assigned, as a reason why the statute does not apply; for if both are sound, there are two distinct reasons for the same conclusion. It is obvious, however, that if one is sound and the other unsound, no immediate practical inconvenience will ensue, if the unsound proposition be assigned as the ground of the decision. Hence an error originating in such a case would probably long pass unchallenged.

§ 618. But we have now to deal with those cases, which depend exclusively upon the proposition under examination; and to consider the question whether it enunciates a correct general rule, embracing all cases to which its terms fairly apply, and taking them out of the statute, notwithstanding that they would otherwise be within it. This is precisely the effect which some writers claim for the doctrine in question, and even for more indefinite and comprehensive statements of a doctrine of the same general character. In this position they are supported by several dicta in the reports, and some adjudications. As a leading author says, in the course of a defence of this proposition, "the principle is large enough to embrace every instance in which a guaranty is based upon, or given for a valuable consideration, moving directly or indirectly to the guarantor." (b) It is manifest that if there is any principle of such sweeping application, an element of uncertainty will be present, in most cases where the statute is supposed to be applicable to a promise to pay a third person's pre-existing debt; for there are but few such cases, where a consideration did not move directly or indirectly to the promisor, and where his interest was not subserved thereby.

§ 619. Still this proposition has been repeated so often, by jurists of such acknowledged reputation, as being

(b) 1 Smith's Leading Cases, sixth American edition, page 492.

unquestionably sound in law, that it requires some courage to attack it; and perhaps we would not have ventured to do so single handed; but the task has been undertaken, and we think successfully accomplished, in two recent adjudications, the reasoning in which is very strong to show that it cannot be maintained. Indeed a grave question may arise whether in one of them, the court has not gone too far in the opposite direction, and by an erroneous explanation of some of the cases, circumscribed too much the field, within which the principle that the promise is good without writing, where the promisor or his property was previously liable for the debt, can reasonably and safely operate.

§ 620. In the first of these cases, *Fullam v. Adams*, 37 Vermont, 391, A. D. 1864, the Supreme Court of Vermont distinctly overruled one of the propositions, by which Chief Justice Comstock in *Mallory v. Gillett*, illustrated his third class of cases, being those "where, although the debt remains, the promise is founded on a new consideration which moves to the promisor." (c) The action was brought by a lawyer, upon a verbal promise made by the defendant, by way of retainer, on the occasion of the defendant's employment of the plaintiff as his counsel in an expected litigation, relative to his transactions with his brother John, who had failed in business. The promise of the defendant is stated in the report to have been, that he "would pay the plaintiff one half of what the said John was owing the plaintiff, amounting to some \$300 or \$400, and reasonable fees and charges for his services." The plaintiff had a verdict, and on an exception taken by the defendant to the admission of the evidence, on the ground that the contract was within the statute of frauds, the judgment was reversed and a new trial granted. The opinion, delivered by Poland, C. J., is very voluminous; it attacks the whole doctrine that a new and distinct consideration, moving from the promisee to the promisor, will

(c) Ante, § 64.

§ 621. The next case, *Maule v. Bucknell*, 50 Pennsylvania, 39, A. D. 1865, contains an equally decisive repudiation of the doctrine now under examination. The substance of the first count of the declaration was, that the plaintiff and three others were directors of the Eastern Market Company, and had control of its affairs; and that the defendants, in consideration of the transfer to them, by

promises to pay a debt made to a creditor, by a person who has received from the debtor a fund for that purpose. In both those classes of cases the true reason why the promise is not within the statute, is that the promisor holds a fund of the debtor for the purpose of paying the debt, so that it is his duty to do so; and when he promises the creditor to pay it, he promises in substance to pay his own debt, and not that of another; and although the original debtor still remains liable, his real relation is rather that of a surety for the person who has assumed the duty of payment, than of a principal for whom the latter has become a surety. The opinion then proceeded to amplify the proposition that the cases where a creditor holds a security for the payment of the debt, which he surrenders to the promisor upon the latter's undertaking to pay the debt, stand substantially upon the same principle as the others just mentioned. The substance of *Williams v. Leper* and kindred cases is that the party making the promise is liable, because by the arrangement he becomes the holder of a fund, which was appropriated to the payment of the debt, and clothed with a duty or trust in respect thereto, which the law will enforce in favor of the promisee. In these cases the promise was founded upon a new consideration, moving between the newly contracting parties, and for the benefit of the promisor; but that fact does not prove that all contracts founded upon such a consideration are without the statute; on the contrary, when the promise is a mere contract of guaranty, it comes within the statute, although a distinct consideration therefor be paid directly to the party making the promise. This the learned Chief Justice illustrated by the principle upon which the cases relating to the contracts of a factor acting under a *del credere* commission were decided, (see chapter xviii, article ii), which is, he contended, merely that the factor undertakes for his own fidelity; and by references to other cases, where a promise to pay the precedent debt of another, made upon a new consideration moving directly from the promisee to the promisor, was held to be within the statute. The result of this examination is said to be, that whether the promise is within or without the statute, does not depend upon whether the consideration moved wholly between the new parties; but the test is whether the leading object and purpose of the transaction were to become responsible for the payment of another person's debt. And it is almost impossible, in the learned Chief Justice's opinion, to imagine a

the plaintiff and his associates, of a certain amount of the stock held by them in that company, and the resignation by them of their offices as directors thereof, whereby the defendants might themselves become directors, promised to pay certain debts of the corporation, and among others a debt due to the plaintiff which he claimed to recover. The second count was framed with a view of recovering

case where a promise to pay the debt of another, for which he continues to be liable, made upon a consideration moving wholly from the creditor, and in which the debtor has no concern, can have any other leading purpose and object than to make the promisor a surety or guarantor of the debt. The argument that such a transaction should be treated as a purchase of the consideration by the promisor, will not bear investigation; because, if it is sound, then the promisor only pays for what he receives, and after he has fulfilled his promise the creditor may still proceed to collect the debt from the original debtor; and payment by the original debtor will not protect the promisor, against an action by the creditor for payment of the purchase price. For these reasons, as well as because it is not comprehensible, why the parties to an actual sale and purchase should effect their object by means of a contract to pay the debt of another, he said that such a contract is made with the purpose and intent to answer for the debt of another; that what is paid or done, as a consideration, is for that purpose merely; and to call it a purchase and sale, is a simple perversion of those terms. The result is summed up thus: "If the real substance of the promise be to perform some duty or obligation of the party making the promise, it is not within the statute, though in form it is a promise to pay another's debt, and the result of its performance may effect the payment of the debt of another. And we believe it will be found that in all the cases now regarded as sound, where it has been held that a parol promise to pay the debt of another is binding, the promisor held in his hands funds, securities or property of the debtor, devoted to the payment of the debt; and his promise to pay attaches upon his obligation or duty growing out of the receipt of such fund." If, the learned Chief Justice proceeded, the promise is founded upon the consideration of the property sold by the debtor to the promisor, or placed by him in the promisor's hands to pay the debt; or if a creditor, holding a security received from the debtor, surrenders it to the promisor upon his promise to pay the debt; in either case, if the promise is not fulfilled, the debtor would have a remedy in some form against the promisor. But if the exemption from the operation of the statute shall be carried any further, every beneficial purpose of the statute is gone. Hence the rule, as laid down by Chief Justice Comstock, that "A, for any compensation agreed upon between him and B, may undertake that C shall pay his debt to B," cannot, in the opinion of the court, be maintained.

damages for the depreciation of the plaintiff's remaining stock, in consequence of the defendants' failure to pay the debts due to other persons. At the trial the plaintiff offered to prove a verbal promise, to the effect stated in the declaration, and sundry other facts tending to show that the affairs of the company were in good condition, at the time of the transfer; but it had failed in consequence of the defendants' mismanagement and breach of their promise; and that the object of the transaction was, at least in part, to improve the value of the stock of the company, remaining in the hands of the plaintiff, after the transfer of a portion thereof to the defendants; and, on the part of the defendants, to obtain the control of the affairs of the company, they being large creditors. But the plaintiff was nonsuited, on the ground that the promise was within the statute of frauds; and a motion to set aside the nonsuit having been denied, a writ of error was sued out of the Supreme Court, where the judgment below was affirmed. Three objections were made to the recovery, but the Supreme Court held that the one arising out of the statute of frauds was insuperable, and declined to consider the others. The opinion was delivered by Strong, J. The abstract of the views of the learned judge, contained in the note, is commended to the reader's attention; it will be noticed that they generally coincide with the opinions expressed in these pages, with respect to the other classes of cases, governed by the principle that where the promise is substantially to pay the promisor's own debt, the case is not within the statute. (e)

(e) The learned judge began by denying the proposition, that a promise to pay the debt of another can be taken out of the statute, because it rests upon a new consideration, moving from the promisee to the promisor. "The object of the statute," he said, "is protection against fraudulent practices, commonly endeavored to be upheld by perjury; and to these all suits upon verbal contracts to answer for another's debt or default are equally exposed, no matter whence the consideration of the contract proceeded, or to whom it passed." The statute, he continued, makes no reference to the consideration; it is only the promise which is mentioned. Yet there is a class of cases, where the consideration has been more regarded than the nature of the promise.

§ 622. We will now take up those cases which present the most marked contrast to *Fullam v. Adams* and *Maule v. Bucknell*, being those which form the crucial test of the soundness of the supposed legal principle, which the latter condemn so decisively. By this we mean cases which were taken out of the statute, exclusively by the operation

These do not depend upon the fact that the consideration moved from the promisee to the promisor; but upon the fact that it was either a transfer of the creditor's claim to the promisor, making the transaction a purchase; or that it was a transfer to the promisor of a fund for the payment of the debt, or property or securities charged with its payment, whether they came from the debtor or the promisee. "But," said the learned judge, "except in such cases, and others perhaps of a kindred nature, in which the contract shows an intention of the parties, that the new promisor shall become the principal debtor, and the old debtor become but secondarily liable; the rule, it is believed, may be safely stated, that, while the old debt remains, the new must be regarded as not an original undertaking, and that it is therefore within the statute. At least this may be stated as a principle generally accurate." "And it will be found, after examination, that in nearly all the decisions, in which it has been held that such a promise is not within the statute, there was some liability of the promisor or his property, independent of his express promise; or that he had become the actual debtor, so that as between him and the original debtor the superior liability was his. In such cases the consideration for the new promise is regarded as material." After examining the decisions in Pennsylvania, to show that they are in harmony with these views, he added, that among all the authorities cited by the plaintiff in error, there were none inconsistent therewith, except what was said by Kent, C. J., in *Leonard v. Vredenburg*, respecting the third class of cases not within the statute, which is now almost universally admitted to be inaccurate. Then, reverting to the facts of the case at bar, he concluded as follows: "The company remained the primary debtor, and had they paid, the defendants would have had nothing to pay, either to the plaintiff or to the original debtor. The promise of the defendants was therefore in no sense a promise to pay their own debt, or a debt of their property. It was not in relief of any property they owned, or upon which they held a lien. Nor was the consideration for the promise of a nature to take the case out of the statute. It was not a placing in the hands of the defendants, by the debtor or the creditor, funds, securities, or property of the debtor, pledged or devoted to the payment of the debts. The transfer of the small number of shares of stock, and the resignation by the plaintiffs of their directorship, were to enable the defendants to become directors, not to place funds in their hands to pay the debts. The averment is, that it was their own money they promised to pay in discharge of the debts, and it is because

of that principle; the circumstances being such, that without its help, they must have been decided otherwise. It may occasion some surprise, and it certainly affords a very strong argument against the existence of any such principle, as a rule of general application, that although it has been asserted as law in scores of cases, extending over certainly a quarter of a century, our researches have enabled us to find but two, and those of quite recent date, which answer this description.(f) And it is believed that neither of these cases can be sustained by any logical course of reasoning; on the contrary that they are striking illustrations of the inconsistent, not to say dangerous consequences, of the rule by which they were governed.

§ 623. The first of these decisions comes to us from a source no less authoritative than the Supreme Court of the United States. In *Emerson v. Slater*, 22 Howard, 28, decided A. D. 1859, it appeared at the trial that the plaintiff had entered into a written contract with a railroad company, whose road was in process of construction, providing for the building of certain bridges for the company, for a stipulated compensation, payable in specified proportions and at specified periods therein mentioned; under which the plaintiff had commenced the work; but the railroad company having failed and become insolvent,

they did not pay their own money that this action is brought." Compare this case with *Alger v. Scoville*, 67 Massachusetts (1 Gray), 391, ante, § 376, and post, § 630. The principal difference between the two cases, with respect to the circumstances attending the consideration, is that in the latter it was expressly shown that the transfer gave the defendant the entire control of the corporation; but the distinction is believed to be immaterial, and the true ground upon which that case can be sustained, is that the promise was not made to the creditor. Whether in *Maule v. Bucknell* the same principle might not have saved the cause of action under the second count, was not argued or considered.

(f) We lay out of view those cases which affirm that the statute does not apply, where a lien upon the debtor's property has been surrendered to him, in consideration of the promise; it being now admitted that they proceeded upon an erroneous principle, and were incorrectly decided, unless the promise could be saved from the statute by some other rule.

he had stopped and refused to proceed further. The defendant was a large stockholder in the company, and holder of its bonds; and he had leased to the company a quantity of railroad iron to be laid down on the road, under a contract, whereby the company was to pay him, for the use of the iron, certain sums monthly, until the full value thereof, as fixed in the contract, with interest, should be paid; and then the defendant was to sell the iron to the company. In order to secure these payments, the company had assigned to the defendant the proceeds of the railroad, to an amount equal to the value of the iron, which the superintendent was to retain in his hands.

§ 624. Under these circumstances, the defendant entered into a written agreement with the plaintiff, to the effect that the latter would complete the work provided for in his contract with the company, by a specified time; for which the defendant would pay him, part in cash and part by his notes, certain fixed sums, at periods specified in the contract; that the payments should be applied upon the company's indebtedness to the plaintiff; and that the contract between the parties should not affect the contract between the plaintiff and the company, or any action pending between them. In order to indemnify the defendant against his contract with the plaintiff, the company also transferred to him certain property, which appeared to include all its property, except its franchise. The plaintiff did not complete the work, within the time specified in the contract between him and the defendant; and it had been held, when the cause was formerly before the court, (g) that time was of the essence of the contract; but upon this trial, he offered to prove a verbal extension by the defendant of the stipulated time for performance, to a day subsequent to that, when the work was actually performed. This was excluded by the judge, on the ground that as the written agreement was a special

(g) See *Slater v. Emerson*, 19 Howard 224, where the substance of the contracts is given at greater length

promise to answer for the debt, default, or miscarriage of another, the substituted agreement, not being in writing, was within the statute. The plaintiff thereupon asked to recover upon the common counts; but the judge ruled that he was not entitled to do so, and the defendant had a verdict, and judgment thereon. The writ of error was brought to review these rulings upon exceptions, and after argument the judgment was reversed.

§ 625. Mr. Justice Clifford, delivering the opinion of the court, referred to the question whether the statute permits the subsequent verbal alteration of a written contract, in a case falling within its terms, and said that although the weight of authorities was, in his opinion, against the validity of such an alteration, it was unnecessary to decide the question in the present case; as the court were of opinion that the promise contained in the written agreement was not within the statute; and hence the common law rule applied, by which a verbal waiver or enlargement of the time of performance was valid. His Honor then laid down the rule, governing this class, as follows: "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." Applying this principle, the learned judge said that this agreement was an original one; on its face it purported to be between parties for their own benefit, and the contract between the plaintiff and the company was apparently referred to, as descriptive of the subject matter of the contract between the parties; and doubtless also because the company had indemnified the defendant. But, he continued, when the attending circumstances are considered, the presumption is much stronger that it was made for the defendant's benefit mainly, if not entirely. The defendant had leased railroad iron to the company,

and the rules which they lay down are given at length in these pages. But it contains the error which caused the abandonment of the rule laid down in the New York cases; and omits the redeeming feature, which enabled it long to hold its own, and which the Massachusetts cases retain and amplify as indispensable to its operation. (i) If this decision is law it is difficult to see why, if the third person is also debtor to the promisor, any thing which tends to improve his credit or his ability to pay the promisor, will not take a promise to pay his debt out of the statute, whether the promise related to an antecedent debt, or one then newly contracted. (j)

§ 627. The next case which, although more startling in its results, is more defensible in principle, because at least the defendant acquired what the plaintiff gave, is *Kutzmeyer v. Ennis*, 3 Dutcher (New Jersey), 371, A. D. 1859. There the first count of the declaration stated that the defendant had made a written contract with Riley and Goodwin, to construct certain buildings for him at a stipu-

(i) The error lies in the supposition that harm to the promisee will affect the question under the statute. It is believed that this proposition always involves a fallacy; it certainly does so in a case like this, otherwise a promise based upon forbearance or the surrender of a security to the debtor, would be amply within the principle. The redeeming feature, upon which the distinguished judge, who so strenuously defended this rule in *Mallory v. Gillett*, wholly based his defence of it, was that it required the consideration to move to the promisor. This the Massachusetts cases amplify, by saying that the benefit to the promisor must be one "*accruing immediately to himself*;" but in *Emerson v. Slater* the opinion entirely omits this vital qualification. And evidently this was not done by accident, or because it was supposed to be included in the phrase that the leading purpose of the promisor was to benefit himself; for a careful examination of the case will show that *no consideration moved from the promisee to the promisor either directly or indirectly*. The original debtor acquired all that the plaintiff gave; the consideration therefore moved to him exclusively; and the benefit which the defendant expected to derive from the transaction, remote, indirect, and uncertain as it was, would come from the debtor and not from the plaintiff.

(j) There is considerable similarity between the facts of this case and those in *Mallett v. Bateman*, ante, § 212, where the Exchequer Chamber ruled the law precisely the other way.

lated price; that the plaintiff had worked on the buildings, at the request of the contractors, and upon a written agreement with one of them; that they having failed to pay the plaintiff, he gave notice in writing to the defendant under the lien law, that a certain amount was "due from the contractors," and requiring the defendant to retain that amount; and thereupon it was averred that he became liable to pay the plaintiff under the lien law. The second count was indebitatus assumpsit for work and labor. The defendant had judgment in the court below, upon demurrer to the first count; the cause was then tried upon a plea of the general issue to the second count; and the plaintiff having had a verdict and judgment, the defendant brought error. It appeared from the bill of exceptions, that the defendant made an express verbal promise to pay for the work, and (either by offers of evidence which were rejected or by express proof,) that the work was done at the request of the contractors, and under a written agreement with Riley; that Riley and Goodwin had recovered judgment against the defendant for the same work for which this action was brought, and that the defendant had paid the judgment; that the judgment in their favor was recovered after a trial, upon which the plaintiff testified that "the work was done by the contractors for Kutzmeyer" (the defendant); and that after the work had been completed, the plaintiff had given the notice and taken the proceedings under the lien law, as set forth in the first count of his declaration. Nevertheless the Supreme Court affirmed the judgment, stating the principle under examination in language essentially different from that contained in the opinion in the former case, and holding, upon their method of stating it, that it took the defendant's promise out of the statute. The court added, (what under the circumstances would almost seem to be ironical,) that the defendant might have retained the amount due to the plaintiff, from the moneys paid to the contractors. The facts of this case show very clearly that both parties understood, that the leading object of the promise was to guaranty the debt

of the contractors ; and, as the court stated the rule, that circumstance would appear to be of no consequence. (k)

§ 628. Not only do these two cases disagree fundamentally as to the terms of the rule, by which both profess to be governed ; (and each states it in a form less defensible than that which we have given to it ;) but they are also directly at war with numerous other decisions, in cases where the plaintiff held a subcontract to do part of a work, which the third person had contracted to do for

(k) The opinion, delivered by Green, C. J., after saying that as the work was done upon the express promise of the defendant to pay for it, it was immaterial whether Riley and Goodwin had recovered judgment for it against the defendant, or had received the price, proceeded to consider the effect of the lien notice, the plaintiff's evidence on the former trial, the special count of the declaration, and the contract between the plaintiff and Riley ; all of which, it was said, showed clearly that the plaintiff understood that he originally gave credit to the contractors, and not to the defendant. "But," it was added, "the question is not to whom the credit was originally given, but whether Kutzmeyer" (the defendant below) "did not afterwards assume the liability." Then the learned Chief Justice proceeded to consider the exception to the refusal of the judge at the trial, to charge that, as the work was done under the contract between the plaintiff and Riley, any promise by the defendant to pay for the same should have been in writing ; respecting which he said : "The court was right in refusing to charge as requested, though the reason assigned for the decision may not be valid. The real ground on which the decision stands is that the promise is not within the statute of frauds. The rule is that where the promise to pay the debt of another is founded upon a new consideration, and this consideration passed between the parties to the promise, and gives to the promisor a benefit which he did not enjoy before, and would not have possessed but for the promise, then it will be regarded as an original promise, and therefore will be enforced, though not in writing. 1 Parsons on Con., 498. This is the precise position of the parties in this case. The evidence tends to show, and, if the jury believed the plaintiff's witnesses, does show, that though the work was originally undertaken by Ennis at the instance of the contractors, yet he refused to proceed and the work was stopped, until Kutzmeyer promised payment. The work was not done for a third party, but for Kutzmeyer himself. He was interested in the completion of the work. He received the benefit of it, and he had in it his power to indemnify himself for the advance to Ennis, by withholding the money from the contractors."

the defendant; and the plaintiff refused to go on with his work, until the defendant promised to pay him. In such cases it has been repeatedly held that the promise was without the statute, only when it appears that the plaintiff had discharged the third person; although the performance of the work may have enured to the benefit of the defendant.⁽¹⁾ Those decisions are therefore direct authorities against the ruling in *Emerson v. Slater* and *Kutzmeyer v. Ennis*, and against the whole doctrine that a benefit to the promisor will take the promise out of the statute, in whatever form it may be stated.

§ 629. The next class of cases where the general proposition under examination is asserted to be law, consists of those where it was assigned, as a reason for taking out of the statute the promise upon which the question arose; but either the circumstances did not require the invocation of its aid, because the case properly depended upon some rule having no relation to it; or else the case came within one of the specific classes governed by well defined rules, forming corollaries of the principle, that where the promise is substantially to pay the debt of promisor it is not within

(1) See chapter ix, article iii, and the following cases: *Puckett v. Bates*, 4 Alabama, 390; *Ellison v. Jackson, etc., Company*, 12 California, 542; *Noyes v. Humphreys*, 11 Grattan (Virginia), 636; *Warnick v. Grosholz*, 3 Grant's Cases (Pennsylvania), 234; *Andre v. Bodman*, 13 Maryland, 241; *Bresler v. Pendell*, 12 Michigan, 224; *Sinclair v. Richardson*, 12 Vermont, 33; *King v. Despard*, 5 Wendell (New York), 277. But see *Devlin v. Woodgate*, 34 Barbour (New York), 252 contra. It is said in 1 Smith's Leading Cases, 6th American edition, 489, that the reason why the principle under examination will not suffice to save a verbal promise, in this class of cases, is "because the benefit, though real, is not, under these circumstances, sufficiently certain to constitute a legal consideration." In a recent case presenting, upon one hypothesis, the question how far this principle will control the application of the third rule; and, upon another, a question very analogous to that which which arose in the cases just cited, the court was driven to a very fine spun line of argument, to escape the alternative, of holding the defendant to be liable, on the ground that the leading object of the promisor was to benefit himself, or of overruling altogether the principle. See *Clay v. Walton*, 9 California, 328; post, § 641.

the statute. As we have already said, whenever this proposition means nothing more than that principle, it is open to no objection as a rule of law.

§ 630. Among the cases of this description, *Alger v. Scoville*, 67 Massachusetts (1 Gray), 391, A. D. 1854, is the most conspicuous. (m) There, as we have already said, it was held that a promise to indemnify the plaintiff, against his accommodation indorsements of outstanding notes of a corporation, made in consideration of the transfer of the plaintiff's stock in the corporation, and a note against it, held by the plaintiff, was not within the statute, because it was not made to the creditor. But the court also added, that if the promise could be regarded as being to answer for the default of the company, it was not within the statute, because "when the leading and obvious object of the promisor was to induce the promisee to forego some lien, interest, benefit, or advantage held by him, and to transfer that interest, or confer that or some equivalent benefit on the promisor, although the effect may be to discharge another person from an obligation, still it is a new, independent and original contract between the parties, and is not within the statute of frauds required to be in writing." It was further said that the substance of the transaction was that the plaintiff placed in the defendant's hands the funds, out of which the notes would, in due course of business, be paid. But the case is now universally regarded as an authority upon the first point decided, which is a well settled principle of law, as we have already seen. (n)

§ 631. The same general observation will apply to *Small v. Schaefer*, 24 Maryland, 143; (o) *Mason v. Hall*, 30 Alabama, 599; (p) *Spann v. Baltzell*, 1 Florida, 301; (q) *Jepher-son v. Hunt*, 84 Massachusetts (2 Allen), 417, (r) and numerous other cases, where this proposition was assigned.

(m) Cited also ante, § 376.

(n) Chapter xi. The case is so treated in *Furbish v. Goodnow*, 98 Massachusetts, 296.

(o) Ante, § 413.

(q) Ante, § 494,

(p) Ante, § 416.

(r) Ante, § 136.

quite unnecessarily as one of the grounds of the decision, the statute being clearly inapplicable under some other well settled principle.

§ 632. Cases of the other kind, namely, where this proposition was assigned, in general terms, as the ground for taking the promise out of the statute, but in reality the facts called for the application of some specific principle, derived from the general rule that a promise to pay the promisor's own debt is not within the statute, are even of less authority to support this proposition, as a rule of universal application; because our argument is that it is true in all such instances and no other. Many such cases have been cited in previous pages, under the specific principles to which they respectively belong. Among them *Reed v. Holcomb*, 31 Connecticut, 360, decided A. D. 1863,(s) is quite noteworthy, as showing the tendency of this doctrine to swallow up all other principles, by which the application of the statute is regulated, and to introduce vagueness and confusion into this branch of the law. There, as we have seen, the court was required to pass upon the question, whether a promise to indemnify the plaintiff for indorsing a third person's note at the request and for the benefit of the defendant, which the defendant himself subsequently indorsed, was within the statute. But it was held that the statute did not apply, for a reason embodying the proposition now under discussion, in one of its protean forms.

§ 633. Another case, illustrating the same tendency, which has not yet been cited, is *Lemmon v. Box*, 20 Texas, 329, A. D. 1857. There the question was whether a plea of set-off could be sustained; the allegation being that the plaintiff requested the defendant to procure a note from C. and E. Carpenter for a specified sum, and an order upon him to accept the note as cash; and promised the defendant that if he would do so, he would pay the amount; and

(s) Ante, § 467.

that after the order and note had been obtained, he repeated his promise. The court held that the amount of the note and order could be properly offset against the plaintiff's demand, on the ground that the plaintiff's leading object was to subserve *some* purpose of his own; and although the transactions or dealings between the plaintiff and the Carpenters were not stated, "the manifest inference" was that he owed the Carpenters money; and "apparently" he thought this the most convenient way in which he could pay his debt; and that, "for aught that appears," there was no original indebtedness on the part of the Carpenters to the defendant; but "he may have purchased their claim against the plaintiff." So a judgment for the plaintiff was reversed, because the plea of set-off was ruled out. Upon the facts assumed by the court to exist, the promise was to pay the promisor's pre-existing debt to a transferee thereof.

§ 634. It is somewhat remarkable, that the cases of this description, where we should find the greatest difficulty in showing, that although this general proposition was stated as the ground of the decision, the result was really controlled by the application of one of the specific propositions to which we have referred, have arisen in Pennsylvania and Vermont, where the general proposition has since been so emphatically repudiated; and the same court which decided the doubtful case, has by a subsequent construction of it, avoided the doubts which might otherwise arise, whether it could be accommodated to our theory.

§ 635. In *Arnold v. Stedman*, 45 Pennsylvania, 186, decided A. D. 1863, the defendant had agreed to sell certain real estate to one Barrett, for a sum payable in instalments; and the contract contained a clause by which Barrett agreed to surrender possession of the property, upon the first instalment remaining unpaid. Barrett took possession, and before the first instalment became payable, the plaintiff, under a contract with him, built a barn on

the premises. The first instalment not having been paid, the defendant commenced an action of ejectment against Barrett; pending which the plaintiff filed a mechanic's lien against the property, for the amount remaining unpaid upon his contract with Barrett; and subsequently the defendant, in consideration that the plaintiff would stay his proceedings, promised to pay him his debt, when the property should come back to the defendant, in consequence of the ejectment suit. At a still later date the defendant recovered the possession of the property. A judgment for the plaintiff was affirmed by the Supreme Court. It was held that the promise was not within the statute on the ground that it was a new and original contract, founded upon a new and fresh consideration between the parties to this suit; and that the defendant's object was not to answer for the debt of Barrett, but to subserve a purpose of his own. But the subsequent case of *Maule v. Bucknell*, 50 Pennsylvania, 39, explains this case as having proceeded upon the ground that the promisor's property was liable for the debt, independently of his promise to pay it.

§ 636. In *Lampson v. Hobart*, 28 Vermont, 697, A. D. 1856, and also in *Cross v. Richardson*, 30 Vermont, 641, A. D. 1858, it would have been difficult to say that any specific rule, as distinguished from the general proposition, controlled the result, had not the court itself subsequently surmounted the difficulty. It is unnecessary to recapitulate these cases in detail; for in *Fullam v. Adams*, 37 Vermont, 391, they were authoritatively explained, as having proceeded upon the ground that the promisee surrendered to the promisor a security or lien upon property; notwithstanding that in each of them the broad proposition under discussion was assigned, in one of its varied forms, as a reason for the decision. And it is not easy to see what security the plaintiff in the first cause had obtained. (t)

(t) But it was also intimated that *Lampson v. Hobart* was erroneously decided; and with this conclusion we agree. It is in direct conflict with *Waldo v. Simonson*, 18 Michigan, 345, A. D. 1869, published while this volume was passing through the press.

§ 637. The case of *Templetons v. Bascom*, 33 Vermont, 132, A. D. 1860, (u) although quite recent, has provoked considerable discussion, which is put at rest by the subsequent authoritative explanation of it. There it appeared that the plaintiffs were creditors of the father of the defendant who had died intestate, leaving a considerable estate; that the defendant was his only child and entitled to all the estate after payment of the debts; that immediately after the death of his father, the defendant entered into possession of the estate; and afterwards, in consideration that the plaintiffs would not present their claim to the commissioners upon the estate, appointed by the probate court, or take the necessary legal steps to have it chargeable upon the estate, the defendant repeatedly promised to pay them the amount. The first promise was made shortly after the death of the father; subsequently the defendant was appointed administrator, and the promise was repeated several times after he was so appointed. It further appeared, that the delay in presenting the claim had caused the plaintiffs to lose their remedy against the estate, as the commissioners had reported, and the report had been confirmed. Here was, at first sight, as far as the application of this clause of the statute was involved, the ordinary case of a consideration resting in forbearance merely; which had incidentally, and not as a part of the original agreement, caused the loss of the debt. But the Supreme Court affirmed a judgment of the County Court in favor of the plaintiffs.

§ 638. Kellogg, J., delivering the opinion of the court, said that on the neglect of the defendant to take administration, the plaintiffs, as creditors, might have done so; and the expense of such administration, and of proceedings before the commissioners to prove the debt, would have lessened the amount of the estate, which the defendant had a direct interest in preventing. He added: "*In view of the interest which the defendant had in that estate,*

(u) Cited also, and commented upon in note to § 15, ante.

such forbearance, or the agreement for it on the part of the plaintiffs, at the request of the defendant, ought to be regarded as a sufficient consideration for the defendant's promise to pay the debt." "The consideration of the promise of the defendant was the waiving by the plaintiffs of their remedy against the estate of the defendant's father—a remedy to which they had an undoubted right,—for the benefit of the defendant, and at his request. His promise to pay the debt to the plaintiffs was founded, not on the consideration of the original debt, but on a new consideration distinct from it, moving from the plaintiffs directly to himself, *the entire benefit of which was anticipated or received by him*. It is therefore to be regarded, not as collateral to the original debt, but as an original and independent undertaking." In *Fullam v. Adams*, 37 Vermont, 391, the Chief Justice, after saying that in this case all the property was in the defendant's hands; added that "the plaintiffs not only relinquished his" (their) "right in favor of the defendant to the funds in his hands, to which he" (they) "had the right to look for payment, but his" (their) "omission to proceed against them, operated as a discharge of the debt itself."

§ 639. The list of cases of this character is by no means exhausted; but we believe that we have cited those where the general proposition under examination was laid down, under circumstances raising the strongest argument in its favor.

§ 640. To glance briefly at another description of cases. There are some where, although the consideration moved to the promisor, and the leading object of the transaction was to subserve some purpose of his own, it was held that the promise was within the statute, because the object to be accomplished by the promisor did not appear to be sufficiently beneficial to him, to satisfy the supposed rule. And it has been suggested, that in all the cases where the third person had undertaken the fulfilment of a contract with the defendant, contemplating an improvement of the

defendant's property, and had sublet a portion of it to the plaintiff, who refused to proceed with the work, till the defendant agreed to pay him; the true reason why the defendant's promise is within the statute unless the original contractor has been discharged, is that the benefit to the defendant is not sufficiently certain.(v) With great deference to the distinguished jurists who have advanced this idea, it appears to be merely an attempt to neutralize the mischievous consequences of the vagueness of this proposition, by the introduction of another proposition equally vague, tending in the contrary direction. The cases to which we refer, strikingly illustrate our position, that the doctrine that a promise is without the statute, when the leading object is to subserve some purpose of the promisor, cannot be sustained in its broad acceptation; and the attempt to limit it in this manner, will, it is believed, only increase the confusion.

§ 641. Thus in *Clay v. Walton*, 9 California, 328, A. D. 1858, the question was whether the defendant was liable upon a verbal promise, to become responsible for brick sold to one Williams, to enable him to complete a contract with the defendant for the erection of the defendant's house. The plaintiffs had judgment, and an order granting a new trial was affirmed on appeal. On the part of the plaintiffs, several points were taken, and among others, the argument was pressed upon the court, that the leading object of the promisor was to subserve his own interests; but the court held that the plaintiff was not entitled to recover. Field, J., upon this point, said: "The correctness of the general rule is unquestionable, but it is difficult to see its application to the present case. There is no evidence that the building could not have been erected, and the requisite brick obtained by the contractor, if the defendant had made no promise; or that brick equally good could not have been obtained elsewhere; or that it was of any particular benefit to the defendant, that the

(v) See note to § 628, ante.

contract with Williams should have been carried out at all; and even had circumstances of this nature appeared in the case, the question would still have arisen, as to what was the leading object and purpose of the promise. The interest which a promisor has in the performance of a contract by another, or the benefit which he may derive thereby, cannot determine his liability. That liability arises from the character of the promise, and the interest in the principal contract, or the benefit to be gained by its performance, become matters of consideration, only as they may serve to determine that character."

§ 642. The decision in the recent case of *Pfeiffer v. Adler*, 37 New York, 164, A. D. 1867, also proceeded on the ground of the lack of sufficient benefit to the promisor to sustain the promise. There the action was upon a verbal promise of the defendant, a widow, to pay a debt due from her deceased husband to the plaintiffs; and the consideration is stated in the report to have been, that the plaintiffs "promised to sell goods on credit to her, to enable her to carry on business, and to assist her in settling with other creditors of her husband; and these promises they fulfilled." It is not stated whether he left a will or assets, and apparently there was no evidence on the latter point. The cause was tried before a referee, who dismissed the complaint. The judgment entered upon his report was affirmed by the Supreme Court, and the plaintiff appealed to the Court of Appeals; where the judgment was again affirmed.

§ 643. Porter, J., delivering the prevailing opinion, said: "It does not appear that the husband left any property, or that the widow had any interest to subserve by assuming the payment of his debts. She was under no obligation to the plaintiffs, unless one was created by her unwritten promise to pay what she did not owe. The original demand was not extinguished by the arrangement, and there was no such new consideration as would suffice to take the case out of the statute of frauds. The settlements which

the plaintiffs were to aid her in negotiating were of the debts of another, for which she was not liable, and in which she had no personal concern. She was evidently in good credit, for the appellants were willing to trust her for the amount of her husband's debt, and for all she was willing to purchase. A verbal promise to sell goods to a responsible party, for their full value, and on the usual terms, forms no consideration for an independent engagement to pay the antecedent debt of a third person.^(w) There is nothing in the facts found by the referee, to withdraw the agreement from the operation of the statute of frauds."

§ 644. So in *Osborne v. The Farmers Loan and Trust Company*, 16 Wisconsin, 35, A. D. 1862. There the defendant had received from a railroad company a deed of surrender of its road, equipment and franchises, in trust to pay off certain debts and incumbrances; and the complaint alleged that afterwards the defendant undertook to pay a debt of the company due to the plaintiff, (not provided for in the deed,) in consideration that the plaintiff would procure the passage of a resolution by the directors of the company "recommending and instructing the defendant" to make such payment; which he had procured to be done at much labor and expense. At the trial the plaintiff having proved the terms of the deed of surrender, and that the defendant had since received from the revenues of the road, an amount equal to the debt of the company to the plaintiff; offered to prove the promise by oral testimony, which was excluded on the ground that it was within the statute. The defendant having had a verdict, the judgment thereon was affirmed on appeal. The argument of the plaintiff's counsel was to the effect that the plaintiff insisted that the defendant was liable to pay the debt; and that his procuring the resolution to be passed avoided a law suit; that the resolution recognized the legality of the defendant's possession of the road; and that it might, by way

(w) This proposition of the learned judge seems to conflict with the understanding of the court and counsel, in *Wheeler v. Collier, Croke Elizabeth*, 406.

of estoppel, legalize other payments of the same character theretofore made by the defendant. But the court said: "The respondent was not benefited by the passage of the resolution by the directors, as we can see. It is claimed that it might be beneficial to the respondent because it would be a recognition by the directors of its right to the possession of the road. But the respondent had already acquired this possession by the deed of surrender. The suggestion that the resolution could possibly benefit the respondent in any manner must be disregarded." (x)

§ 645. The case of *Reynolds v. Carpenter*, 3 Chandler (Wisconsin), 31, A. D. 1850, doubtless proceeded upon a similar ground, although the consideration did not move from the plaintiff but from the debtor. The action was to recover upon a verbal promise of the defendant to pay the board bills of various persons; and it appeared that the defendant was engaged in the construction of a canal, and in consideration that the debtors would go to work for the defendant, he undertook with the plaintiff to pay the bills in question. The plaintiff having recovered in the court below, the judgment was reversed on appeal; the court merely saying that there could be no doubt that the case was within the statute of frauds, without discussing the question.

§ 646. It will be noticed that these cases were precisely of that class, where the general principle that the statute does not apply to a promise to pay the promisor's debt, would not operate. The first three effectually dispose of the theory, that harm to the promisee will take the promise out of the statute. But it is difficult to state any ground upon which a court can undertake to gauge the amount of

(x) See also *Brown v. Barnes*, 6 Alabama, 694, A. D. 1844, where it was held that a promise by a person who had the custody of the estate and management of the affairs of a debtor, that he would pay the debt, in consideration that the plaintiff would state the items of his account, swear to their correctness before the mayor of Philadelphia, and procure his official certificate thereof, was within the statute, because the consideration was not beneficial to the defendant.

benefit, which an adult promisor of sound mind will receive from the consideration of a contract entered into by him, when it moves directly from the other party to him, and at his request. He is upon every principle the sole and final judge of that benefit. We therefore regard these cases as practically demonstrating the unsoundness of the supposed rule, which requires such violations of approved legal principles to reconcile it with the statute.

§ 647. To sum up the results of this investigation. The advocates of the supposed rule do not agree upon its terms; all of them define it in very vague and elastic language; most of them in terms, which would include nearly every promise to pay another's precedent debt upon a new consideration, and introduce confusion into all the principles by which the application of the statute is regulated. Its best and most defensible definition makes it very nearly tantamount to the familiar and compact rule, sanctioned by all the English as well as the American cases; the effect of which is controlled in this country by well settled and defined principles; that a promise is not within the statute, where the promisor or his property was liable to pay the debt. Whenever it means any thing more than this, the courts, whatever they may say, in practice refuse to follow it; the few cases where they have allowed it to work out its legitimate consequences, being indefensible upon principle, and upon the authority of other numerous decisions. Hence we conclude, that the cases which so emphatically condemn it, contain a correct exposition of the law; that whenever it asserts a sound rule, it is a mere paraphrase of a better defined principle; and that because it never answers any useful purpose; sometimes asserts a dangerous fallacy; and constantly leads to uncertainty and confusion; it should no longer be permitted to encumber and disfigure our system of jurisprudence. (y)

(y) Before taking leave of this entire class of cases, it is perhaps proper to state why we have not treated, as the enunciation of a distinct principle, the suggestion, contained in several text books and authorities, that some of the early decisions of the Williams and Leper series are to be explained upon

CHAPTER EIGHTEENTH.

CASES WHERE A GUARANTY OF THE DEBT OF A THIRD PERSON IS NOT WITHIN THE STATUTE.

§ 648. The cases embraced within this chapter are all that remain to be examined, in order to complete the discussion of that clause which relates to special promises to answer for the debt, default, or miscarriages of another person. Although it would seem, at first sight, that they were of all others, those most obviously included within the terms of the clause, inasmuch as they are, not promises that the promisor will pay a debt for which another is also liable, but promises that the debtor himself shall pay it; yet there are no other cases, with respect to the exclusion of which from the operation of the statute, the courts in this country are now so perfectly of accord. They are very sharply defined, being limited to two kinds of cases; namely, those where the debt guaranteed was transferred to the promisee by the promisor, at the time of making the guaranty, upon a consideration moving wholly between the parties; and those where it was thereafter to be contracted through the promisor as the factor of the promisee.

the theory, that the consideration of the promise was a purchase. But it is not possible to suppose that this remark was intended to mean that a promise which would be within the statute, if it was founded upon a money consideration, would be taken out of the statute, by the fact that the consideration was a purchase of property or of an interest in property. Evidently the idea intended to be conveyed, was that if a purchaser of property promises, as the consideration of the sale, to pay the debt of another, for which the property is holden, the statute does not apply. This is consequently nothing more than a statement of certain circumstances under which the eighth rule becomes applicable; and the cases where they occur, differ from the others only in the fact that the promisor acquired an interest in the property simultaneously with making the promise. This feature was noticed in the 574th section.

operation of the statute, is that the guaranty is merely a substitute for the promise of the guarantor to pay whatever the other party is to receive, in exchange for the consideration furnished by him. It is therefore said to be a method of paying the guarantor's own debt, adopted for his convenience, and accepted in place of his own direct obligation. This is very satisfactory, when the consideration of the transaction was connected with a precedent debt of the guarantor; or when, for any other reason, the surrounding circumstances plainly show, that the third person's obligation and the accompanying guaranty were in fact accepted, in lieu of so much money to be paid by the guarantor. But it is open to considerable criticism, when the parties had no other object in view, than a purchase and sale, especially when the security was sold for money and at a considerable discount. And this is the precise state of facts upon which the question frequently arises.

§ 651. The exclusion of this species of contract from the provisions of the statute, has also been occasionally made to depend upon the elastic proposition, examined at length in the last chapter; namely, that where the leading object of the promisor was to subserve his own interest, the statute does not apply. But as far as that proposition is identical with the one just mentioned, it is of course open to the same objections; and if it can be treated as having, in this description of cases, any other signification, the distinction depends upon the fact, that the object of the guarantor was to acquire the consideration; and in that aspect the distinguishing feature, that the debt or contract guarantied passed from him to the other party, becomes immaterial. So that if this be the true explanation of the rule, it would sustain a guaranty of a debt originally contracted by the third person to the guarantee; which is contrary to all sound principle, and to the authorities cited in the sixteenth chapter. We must therefore look for some other reason for excluding this kind of guaranty from the statute.

§ 652. It has been said that if the security transferred to the promisee was not negotiable, so that he acquired merely a right to receive the proceeds, the case is not within the statute, because the debtor owed nothing to the promisee ; but this reason will not apply where a negotiable security has been transferred, or where the rule of the common law has been so modified by statute, that the assignee is entitled to enforce the demand by an action in his own name against the debtor. The American cases include within the rule both descriptions of securities, and properly so ; for the character of the security, in respect to its negotiability, is merely accidental ; and the prohibition or permission to maintain an action in the name of the real party in interest, upon an instrument which is not negotiable, is a mere rule of procedure. Neither circumstance affords any substantial reason, for a distinction in the application of the principle.

§ 653. It is very evident that this class of promises is not within the intent of the statute ; for although the commentators differ sometimes in the details of the reasons assigned by them, why the legislature included promises to answer for the debt of another within this section ; they all agree in the general proposition, that the motive for the perpetration of fraud and subornation of perjury, in such cases, was to be found in the creditor's temptation to throw upon a person of substance, the burden of a bad debt. But if a debt due to the defendant himself is sold to the plaintiff, for a consideration passing from the latter to the defendant, it is clear that the motive operates in a contrary direction. And in the absence of any express evidence upon the point, the presumption that the purchaser required from the seller a guaranty of payment, although not strong enough to raise a legal inference to that effect, is nevertheless a natural inference from the known usage in such cases ; unless the relative value of the consideration, or some other attending circumstance, shows that the purchaser took the security at his own risk. Indeed this

species of guaranty is only a step beyond that which the law actually implies upon such a transfer.(a)

§ 654. Perhaps therefore a more satisfactory reason, why a verbal contract of this kind is valid, may be found in the fact that it is a mere extension of the terms of the warranty, which the law implies upon the sale of every chose in action or chattel; and not a contract created ab origine, for the purpose specified in the statute. This reason is comprehensive enough to include all variations in the details of the different cases; and it is believed that it rests upon a solid foundation of principle, and finds a close analogy in the reason which has most commanded approbation, for excluding from the statute a factor's *del credere* contract; as well as in the reasons which have controlled the decision of other kinds of cases arising under this clause.(b)

§ 655. But the only English decision upon the subject was placed upon the ground that the transfer of an instrument, which is not negotiable, does not enable the transferee to enforce the payment of any debt or the fulfilment of any duty against the party bound thereby. In *Hargraves v. Parsons*, 13 Meeson and Welsby, 561, A. D. 1844, already cited under another rule,(c) the defendant

(a) Without entering at any length into the question, which has been the subject of considerable discussion, what is the extent of the implied contract, arising upon the transfer for a valuable consideration of a chose in action, by a person who neither becomes a party to it, nor enters into any express warranty with respect thereto; it would seem to be very clear that it amounts at least to "an implied undertaking that he held it by a right and title, which would enable the purchaser to enforce it against the parties thereto." Per Comstock, J., *Delaware Bank v. Jarvis*, 20 New York, 229. In some of the States of the Union local usage, and in others statutory enactments, have established a rule of law that a guaranty of collection is implied upon the transfer for a valuable consideration of any instrument for the payment of money.

(b) See *Macrory v. Scott*, 5 Exchequer, 907, and 20 Law Journal, N. S., Exch. 90, ante, §§ 491, 492; and other cases cited in chapter fourteenth, article second.

(c) S. C., 14 Law Journal, N. S., Exch., 250. See § 366.

and one Parker had made written contracts for the sale by Parker to the defendant of the "put or call" of certain French railway shares, at a certain premium, at any time before the 18th of February, 1844; before which time the defendant sold the option to the plaintiff, with a guaranty in writing, which the court construed as a guaranty for the fulfilment of the contract by Parker. The shares having risen in value, the plaintiff "called" them from the defendant on the 16th of February, at Liverpool; the defendant immediately notified Parker of the "call;" and it was then verbally agreed between the three, that they should be delivered at Paris on the 2d of March; before which time Parker failed. In an action on the guaranty, the plaintiff had a verdict; and the defendant, pursuant to leave reserved, moved for a rule to enter a nonsuit, upon the ground, among others, that the verbal promise was within the statute. The rule was refused, Parke, B., saying that the statute only applies where the debt or duty was due to the promisee; that Parker had not contracted with the plaintiff; and his nonperformance of his contract with the defendant, was no default towards the plaintiff; consequently the defendant's undertaking was not a promise to answer for any default or miscarriage of Parker, in any debt or duty towards the plaintiff; but an original promise that a certain thing should be done by a third person.

§ 656. Of the cases in the United States, specimens presenting almost every possible variety in the facts and in the principles upon which the decisions turn, may be found in the State of New York; where this doctrine is interwoven with a long and very remarkable legal controversy. In *Smith v. Ives*, 15 Wendell, 182, A. D. 1836, and again in *Packer v. Willson*, id. 343, in the same year, the Supreme Court of that State held that a written guaranty of payment indorsed upon an overdue promissory note held by the plaintiff, the consideration of which was forbearance to the maker, was within the statute, and was void when it did not express the consideration. But in

Hough v. Gray, 19 Wendell, 202, A. D. 1838, the same court held that a similar guaranty indorsed upon a third person's promissory note, simultaneously with the making of the note, the note and guaranty having both been given as the consideration of property sold by the payee to the maker, was in legal effect a promissory note; and the guarantor was a joint and several promisor, with the person whose name was subscribed on the face of it. The latter decision was the first of a long series of cases in that State, involving the question whether the statute applies to a written guaranty indorsed upon or subjoined to the note of a third person; which was sometimes presented in the indirect form, whether the action could be maintained against the guarantor as the maker or indorser of the note; and sometimes directly, whether such a guaranty, not expressing the consideration, was void under the statute of frauds. Following out the idea advanced in *Hough v. Gray*, that such a guaranty was in legal effect a promissory note, the courts of New York ultimately found themselves involved in a labyrinth of contradictions and fallacies; from which they were only extricated after the lapse of upwards of twenty years. An outline of this singular controversy, down to the time when it was settled by the recognition of the now prevalent doctrine on this subject, will be found in the foot note.(d)

(d) The case of *Hough v. Gray* was followed by that of *Luqueer v. Prosser*, 1 Hill, 256, A. D. 1841, in the Supreme Court; reported in the Court of Errors under the title of *Prosser v. Luqueer*, 4 Hill, 420, A. D. 1842. The action was against Prosser, Edson, and Arnold, upon a note payable to one Parsons or bearer, made by Edson and Arnold, and a guaranty of payment and waiver of notice of nonpayment indorsed thereon, made simultaneously with the note, and signed by Prosser. The note and guaranty had been delivered on the same day to Parsons, as security for the payment of the price of articles, sold by him to the makers, and he had subsequently transferred it to the plaintiffs. A verdict having been rendered in favor of the plaintiffs, the defendant Prosser moved in the Supreme Court for a new trial, which was denied, the court holding that he was liable with the other defendants as a joint and several maker of the note. The judgment thereon was affirmed by the Court of Errors, the opinion having been delivered by Walworth, Chancellor; it held that the defendant was liable as an indorser,

§ 657. After several conflicting cases upon the legal effect of such a guaranty, and the application of the statute of frauds thereto, the question came before the Court of Appeals in the year 1849, in *Brown v. Curtiss*, 2 New York (2 Comstock), 225, on a writ of error to the Supreme Court, to review the decision reported in *Curtiss v. Brown*, 2 Barbour, 51, A. D. 1847. The evidence at the trial in the court below, showed that the defendant transferred to the plaintiff the note of a third person, payable to the defendant or bearer, and which had not matured, in exchange for the defendant's own note held by the plaintiff.

the waiver contained in his agreement dispensing with a demand and notice; but the learned chancellor also expressed the opinion that the defendant was liable as a maker, (a striking illustration of the confusion which surrounded this subject). But in *Miller v. Gaston*, 2 Hill, 188, A. D. 1842, the Supreme Court, Bronson, J., delivering the opinion, while conceding that the preceding cases established that a guarantor may be treated in all respects as a maker of a note, where he was privy to the consideration, and the guaranty and the note were made simultaneously, took a distinction between those cases and one where the guaranty was made after the note had taken effect. It was held that in the latter case he could not be treated as a maker or indorser, and sued jointly with the other parties by a subsequent holder, under the statute permitting the joinder in one action, of all the parties liable upon the same instrument. It was intimated however that he might be treated as the maker of a new note, and in that capacity sued separately by any subsequent holder in his own name. As the guaranty satisfied the statute, the only question directly involved in the case was the right to maintain the action against all the parties; and in the next case, *Manrow v. Durham*, 3 Hill, 584, A. D. 1842, Nelson, C. J., delivering the prevailing opinion in the Supreme Court, stated that they had entertained no doubt in *Miller v. Gaston*, that the plaintiff, as a subsequent holder, might have maintained the action against the subsequent guarantor alone, as upon a new note. The substance of the case of *Manrow v. Durham* will be presently stated, in the order of its decision in the appellate court; the judgment upon the writ of error having been delayed till seven years after the judgment in the Supreme Court. In the next succeeding case, *Johnson v. Gilbert*, 4 Hill, 178, A. D. 1843, Bronson, J., delivered the opinion of the Supreme Court, holding that the statute of frauds did not apply to a guaranty written on the back of another's overdue chattel note, given by the maker to the defendant, and transferred by the defendant to the plaintiff, simultaneously with the execution of the guaranty, in consideration of a precedent debt due from the defendant to the plaintiff. He said that it was not an under-

iff, and at the same time he indorsed and signed a guaranty thereon, expressing no consideration. The plaintiff having had a verdict, notwithstanding the objection that the guaranty was within the statute, the Supreme Court denied a motion made by the defendant for a new trial, substantially on the ground that under the previous authorities the defendant must be regarded as a maker of the note, although the opinion expressed a decided dissatisfaction with them. This decision was affirmed by the Court of Appeals, but upon a different ground; the opinion having been delivered by Bronson, J., then a member of the court of last resort,

taking by the defendant to pay the third person's debt; but that "it was an agreement to pay his own debt in a particular way." And in *Hunt v. Brown*, 5 Hill, 145, A. D. 1843, where, in consideration of the discharge of a precedent debt due by the maker of a note to the payee, the defendant indorsed upon the note his guaranty of *collection*, which expressed no consideration, (the note and the guaranty having had a simultaneous inception;) Bronson, J., delivering the opinion of the court, held that the guaranty was void under the statute of frauds, because, being a guaranty of collection, and not of payment, the defendant could not be treated as a maker of the note; as the learned judge said that he might have been, within the previous authorities, if he had guarantied the payment of it. In *Leggett v. Raymond*, 6 Hill, 639, A. D. 1844, the court held that a blank guaranty of payment, expressing no consideration, indorsed by the defendant upon a note, payable to him or bearer, after its date and before its maturity, (neither the consideration nor the person to whom it was given appearing in evidence,) might be treated as a blank negotiable indorsement; and the plaintiff might recover on proof of demand at maturity and notice of nonpayment. Bronson, J., who delivered the opinion, expressed his extreme dissatisfaction with his decision, but he held himself bound by the decision of the Court of Errors in *Prosser v. Luqueer*, where, he said, that court treated Prosser as an indorser. But in *Hall v. Farmer*, 5 Denio, 484, A. D. 1848, Beardsley, C. J., delivering the opinion of the Supreme Court, said that "the judicial knot, as it cannot be untied, must be cut;" and accordingly it was held that the defendants' blank guaranty of payment, expressing no consideration, indorsed upon a note payable on demand, simultaneously with the making of the note, the actual consideration having been a precedent debt due to the plaintiff, from the makers of the note, was a guaranty, and not a promissory note; and that it was void under the statute. However in *Curtiss v. Brown*, 2 Barbour, 51, A. D. 1847, where the defendant, the payee of a negotiable note, indorsed upon the note, before its maturity, a guaranty, expressing no consideration, and delivered it to the plaintiff, in discharge of a previous

who, while a justice of the Supreme Court, had combated with great ability and spirit, the doctrine upon which the decision below proceeded.

§ 658. His opinion commenced with a vigorous attack upon all the cases which hold that, under any circumstances, a guarantor of a promissory note can be treated either as a maker or indorser of the note; insisting that the contract is one of guaranty, and nothing else. "Those cases," he said, "have never had any ground of principle to stand on, and I trust they will never again be cited as

debt owing by him, the present Supreme Court of New York, had previously held, though with great reluctance, that the statute did not apply, because the defendant was a maker of the note. But although the Court of Appeals affirmed the decision in this case (see *Brown v. Curtiss*, 2 Comstock, 225, of which the substance is given in the text), the two prevailing opinions repudiated the ground upon which the Supreme Court placed its decision; and the case marks the first step towards the attainment of the reason upon which the application of the statute to this class of cases was ultimately placed. It was however immediately followed by the failure of the court to agree upon any principle upon which to determine the writ of error from the decision of the Supreme Court in *Manrow v. Durham*, 3 Hill, 584, already mentioned. The case in the Court of Appeals is reported under the title of *Durham v. Manrow*, in 2 New York, (2 Comstock), 533. There the plaintiff (*Manrow*) had sued *Durham* and *Moulthrop* in the Common Pleas upon a joint guaranty, expressing no consideration, indorsed upon a third person's note made payable to *Durham* or bearer. It appeared at the trial that before the maturity of the note *Durham* purchased a horse from the plaintiff, and gave the note and the guaranty in part payment therefor, *Moulthrop* having executed the guaranty, at the request of, and as surety for *Durham*. The plaintiff was nonsuited in the Common Pleas, and upon error the judgment upon the nonsuit was reversed, in the Supreme Court, by a majority vote, the prevailing opinion holding that the guaranty was in legal effect a promissory note. The defendants brought error to the Court of Appeals; where *Strong, J.*, delivered an opinion in favor of the affirmance of the judgment with respect to *Durham*, upon substantially the same grounds as those taken by him in his opinion in *Brown v. Curtiss* cited in the text, holding that although in this case the consideration was the purchase of property, the principle was the same as in the other case; the guaranty being, in both cases, merely a method of paying the guarantor's debt. With respect to *Moulthrop*, he said that the two agreed that the maker of the note should pay the debt due primarily from one of themselves to the plaintiff.

authority in this State." He then said that if the statute of frauds was applicable to the agreement before the court, it could not stand, as it was a guaranty expressing no consideration; and it could not be held to be a promissory note, without confounding all legal distinctions in relation to the nature of contracts. But he held that the statute does not apply to such a case, because "although in form this is a promise to answer for the debt or default of another, in substance it is an engagement to pay the guarantor's own debt in a particular way." "It would be good without any writing." He was followed by Strong, J., who

The promise of Moulthrop was not especially for the purpose of paying the maker's debt, but that of his co-guarantor; the method being incidental. It was absolute and unconditional, that the purchase money for the horse should be paid for in a particular way; and his responsibility for the maker's debt was also incidental. Both were bound as principals, and there was no reason for separating them in their liability. The statute, he thought, has no application to a joint engagement of two, to pay the original debt of one of them, through a third person. With him three judges concurred. Jewett, C. J., agreed that the guarantor of a promissory note could not be treated as a maker, whether he came in when the note was made or afterwards; but he argued, in a long and elaborate opinion, that this guaranty was within the statute of frauds, because it was literally an engagement that the maker should pay the note, not that the defendants would pay the money. He distinguished the case from *Brown v. Curtiss*, on the ground that there the defendant was originally indebted to the plaintiff for borrowed money, which indebtedness the plaintiff agreed to discharge, only upon receiving a note with the defendant's guaranty; and as the guaranty which the defendant gave, was void by the statute of frauds, the action could have been sustained upon the original indebtedness, under the money counts in the declaration. He added, that in any view of this case Moulthrop was a mere surety, and a joint action would not lie against him and Durham. In the result of this opinion two judges concurred; one of them however putting his decision on the ground, that as Moulthrop was not a party to the consideration, the joint action could not be sustained. But a judgment of the New York Court of Appeals is not regarded as settling any principle, unless five judges concur, and the absence of Bronson, J., prevented such a concurrence. The same remark applies to the disposition made by the court at the same term, of *Hall v. Farmer*, 2 New York (2 Comstock), 553, on error from 5 Denio, 484. This was the case where the Supreme Court, disregarding its previous decisions, and "cutting the judicial knot," had held that the guaranty was within the statute as already mentioned. In the Court of Appeals, three of

held that the instrument was presumptively a guaranty, but that it might be shown by the attending circumstances to be an original promise; and that would depend upon the object which the guarantor designed to accomplish. If this object was to pay his own debt, the promise was original, notwithstanding its form. He concluded: "This is a plain and palpable case of a promise of a guarantor to pay his own debt, through the note of another; and, what is a material fact to denote the main design of the transaction, the whole credit was given to the guarantor. It is therefore clearly an original undertaking, and neither within the letter of the statute, nor the mischief which it was designed to prevent." In the result of these opinions, but not in the arguments by which it was sustained, four of the remaining judges concurred, and the judgment below was affirmed, with two dissenting votes.

§ 659. But this decision had apparently but little effect upon the settlement of this vexed question. At the De-

the four judges who had voted for affirmance in *Durham v. Manrow*, voted now for reversal; and the fourth united with the three, who had voted for reversal in the preceding case, in voting now for affirmance; placing his decision upon the ground, that as the note was payable on demand, and no credit given, there was no consideration for the guaranty. Thus the daylight which had been made to glimmer through all this fog, by the decision in *Brown v. Curtiss*, was again shut out; and the conflict of opinion continued to prevail in the Supreme Court, then reorganized under the constitution of 1846, so as practically to form several distinct tribunals. In *Burt v. Horner*, 5 Barbour, 501, decided in the year 1849, (but before *Brown v. Curtiss*,) one branch of that tribunal, held that a guaranty of collection, indorsed upon a third person's promissory note, was not within the statute of frauds; and that like other such guaranties, it would be discharged by want of diligence on the part of the guarantee in proceeding against the principal debtor. The consideration of the defendants' guaranty was the sale of goods to them by the plaintiff, upon an agreement to accept in payment thereof the note in question, with their guaranty of collection; the same being then in the defendants' hands, and yet to mature. In *Tyler v. Stevens*, 11 Barbour, 485, A. D. 1851, another branch of the same court held that the statute did not apply to the defendant's guaranty of payment of a third person's note, which was transferred by him to the plaintiff, before

ember term of the Court of Appeals in the same year (1849), two cases, involving the application of the statute to this species of guaranty, were disposed of without any definite decision of the points of law arising therein, in consequence of the inability of a constitutional majority of the judges to agree upon any principle; although one of the cases had been argued three times. These were *Durham v. Manrow*, 2 New York (2 Comstock), 533, and *Hall v. Farmer*, id. 553, abstracts of which will be found in the note to the last section. In one of the opinions delivered in the former case, *Brown v. Curtiss* was explained upon a theory which practically denied to it all efficacy as a precedent upon the principal question involved. The case was greatly complicated by the presentation of another question, discussed in a previous chapter, arising out of the fact that the defendants had jointly executed the guaranty in question, although one of them was a mere surety for the other. In consequence of these conflicting opinions the deadlock remained unaltered.

its maturity, in consideration of a smaller sum of money paid by the plaintiff to the defendant. The contrary decision was made by another branch in *Spicer v. Norton*, 13 Barbour, 542, A. D. 1852, which is said to have been affirmed in the Court of Appeals; but the decision upon the affirmance is not to be found in the reports. The guaranty in question, which was in effect a guaranty of collection, was indorsed upon a third person's previously subsisting note, transferred to the plaintiff by the defendant, as part of the purchase price of a fourth person's note; and no consideration having been expressed therein, the Supreme Court held that it was void under the statute. The prevailing opinion, delivered by Parker, J., attacked the whole doctrine of the opinions delivered in *Brown v. Curtiss*. Upon substantially the same facts, except that the question arose upon a guaranty of payment. the same court also ruled that the guaranty was within the statute, in *Wood v. Wheelock*, 25 Barbour, 625, A. D. 1856. The same opinion was again expressed in *Sweet v. Bradley*, 24 Barbour, 549, A. D. 1857, where the question arose upon a verbal promise made by the defendant, the holder of a note, upon its transfer to the plaintiff in consideration partly of money, and partly of a precedent debt of the defendant, to the effect that the note should be paid at maturity, and that the makers and indorsers were solvent. The court said that the guaranty of payment was within the statute, but the plaintiff was allowed to recover upon the warranty of solvency.

§ 660. But the rule in one description of these cases, was soon afterwards settled by the decision of the Court of Appeals in *Brewster v. Silence*, 8 New York (4 Selden), 207, A. D. 1853. This was also an action upon a guaranty expressing no consideration, subjoined to a promissory note, and made simultaneously with the note, for the accommodation of the maker; the consideration, both of the note and of the guaranty, being a sale of property to the maker by the payee, who had transferred the note with the guaranty to the plaintiff. The defendant had judgment in the Supreme Court, upon a special verdict setting forth the facts; and that judgment was affirmed on appeal by the Court of Appeals; where it was held, with only one dissenting vote, that the guaranty was within the statute, on the ground that it was a distinct contract from the note; and that the cases which hold that such a guaranty is a promissory note, or that the guaranty and the note are one instrument, cannot be sustained. It was also said that the principle of the opinions delivered in *Brown v. Curtiss*, was correct; and that if in this case the sale had been made to the defendant, as it was in *Brown v. Curtiss*, he would have been liable; but the remark was evidently obiter.

§ 661. And the main question, which had continued to be debated in the Supreme Court with as much diversity of opinion as before, was at length settled, and this controversy brought to a close, by the unanimous decision of the Court of Appeals in *Cardell v. McNiel*, 21 New York, 336, A. D. 1860. There the plaintiff's testator had sold a horse to the defendant, and had received from him, in part payment therefor, the chattel note of one Cornell; which the defendant verbally warranted to be "good and collectable;" and that the plaintiff's testator would get the chattel when the note became due. It was one of the terms of the bargain for the sale of the horse that this note was to be received, with the defendant's guaranty, in part payment therefor. A judgment for the plaintiff for the value of the chattel was affirmed upon appeal.

Comstock, C. J., delivering the opinion of the court, said : "It is claimed that the guaranty is void by the statute of frauds. In mere form it was certainly a collateral undertaking, because it was a promise that another person should perform his obligation. But looking at the substance of the transaction, we see that the defendant paid, in this manner, a part of the price of a horse sold to himself. In a sense merely formal, he agreed to answer for the debt of Cornell. In reality he undertook to pay his own vendor so much of the price of the chattel, unless a third person should make the payment for him, and thereby discharge him."

§ 662. This decision was followed by the Supreme Court, upon facts not materially different, in *Fowler v. Clearwater*, 35 Barbour, 143, A. D. 1861, and *Dauber v. Blackney*, 38 Barbour, 432, A. D. 1862.

§ 663. It may therefore be considered as settled in New York, upon the authority of these cases, that where the holder of a third person's promissory note or other contract, negotiable or non-negotiable, which had a valid inception as between the maker and the holder, transfers the same to another person, upon a consideration moving to him, his verbal guaranty thereof, made simultaneously with the transfer and as a part of the transaction, is not within the statute of frauds; and that it makes no difference whether the guaranty is absolute, or subject to any condition or qualification. And similarly that if the guaranty is in writing, but is insufficient as a note or memorandum within the statute, that will not prevent the promisee from recovering, upon proof of the actual consideration. But if the guaranty was made upon a consideration moving to the third person, so that the guarantor came in merely as a surety for him, the guaranty is within the statute. Whether the joint guaranty of the person benefited by the consideration, with another as his surety, (no copartnership or other community of interest existing between them,) would be held to be within or without the

statute as to the surety, is left in doubt; the decision in *Manrow v. Durham* having settled nothing upon that point, and the surety's liability depending upon the principles discussed at length in a preceding chapter, with respect to another question.(e)

§ 664. In other States, the same principles have been established, without a struggle similar to that which attended their adoption in New York; and it is believed that all the American courts, as far as they have spoken, are now entirely harmonious upon this subject. The authorities, some of them anterior in date to the New York decisions, will be found collected in the note. They include cases where the instrument guarantied was negotiable and not negotiable; where the guaranty was founded upon a new consideration, then moving to the guarantor; and where the consideration was a precedent debt of the guarantor. In some of them the new consideration was money paid for the purchase of the instrument guarantied; in others it was goods sold; in others an exchange of the promisee's own obligation, for that of the third person, with the accompanying guaranty.(f)

(e) See chapter eighth, article first.

(f) *Hackleman v. Miller*, 4 Blackford (Indiana), 322, A.D. 1837, cited also ante, § 35a; *Adcock v. Fleming*, 2 Devereux and Battle (North Carolina), 225 (1837); *Jones v. Palmer*, 1 Douglass (Michigan), 379 (1844); *Hopkins v. Richardson*, 9 Grattan (Virginia), 485 (1852); *Hall v. Rodgers*, 7 Humphreys (Tennessee), 536 (1847); *Ashford v. Robinson*, 8 Iredell (North Carolina), 114 (1847); *Beaty v. Grim*, 18 Indiana, 131 (1862); *Rowland v. Rorke*, 4 Jones (North Carolina), 337 (1857); *Thomas v. Dodge*, 8 Michigan, 51 (1860); *Huntington v. Wellington*, 12 Michigan, 10 (1863); *Malone v. Keener*, 44 Pennsylvania State Reports, 107 (1862); *Thurston v. James*, 6 Rhode Island, 103 (1859); *Smith v. Finch*, 2 Scammon (Illinois), 321 (1840); *Dyer v. Gibson*, 16 Wisconsin, 557 (1863). The question frequently arises in this class of cases, whether the guarantee is entitled, in an action upon the guaranty, to recover any thing beyond the amount actually advanced to the guarantor, when the instrument transferred was for the payment of money, and the consideration of the guaranty was a sum, less in amount than that payable by the terms of the instrument, forming the subject of the guaranty. It has been held in some of the United States that under those circum-

ARTICLE II.

Where the debt guaranteed was thereafter to be contracted through the agency of the promisor, acting as the factor of the promisee, under a *del credere* commission.

§ 665. A *del credere* commission has been defined, as a commission "under which the agent, in consideration of an additional premium, engages to insure to his principal, not only the solvency of the debtor, but the punctual dis-

stances the guaranty is usurious; and such, we believe, was generally understood to be the rule in England, independently of the series of recent statutes; which, after gradually emasculating the laws against usury, finally swept them away altogether. And it would seem that in most cases the damages can be reduced to the amount of the actual advance and interest, only for the purpose of taking the contract out of the statute of usury. In several of the United States, the contract may be saved in that manner. The doctrine is well settled in New York that the consideration may be inquired into; and that the guarantee can recover from the guarantor the amount of his advance and interest, but no more. The rule is the same, whether the liability of the guarantor was assumed by indorsing a promissory note or bill of exchange, signing it as surety, or guarantying its payment or collection, either upon its face or by a separate contract. *Braman v. Hess*, 13 Johnson, 52; *Munn v. Commission Company*, 15 id., 44; *Cram v. Hendricks*, 7 Wendell, 569; *Mazuzan v. Mead*, 21 id., 285; *Ingalls v. Lee*, 9 Barbour, 647; *Cobb v. Titus*, 13 id., 45, affirmed 10 New York (6 Selden), 198; *Burton v. Baker*, 31 Barbour, 241. So where a mortgage was assigned, with a covenant for the payment of the mortgage debt, *Jones v. Stienbergh*, 1 Barbour's Chancery, 250; or a covenant of the assignor, with another as his surety, to pay any deficiency upon foreclosure, *Goldsmith v. Brown*, 35 Barbour, 484; or a covenant of the assignor, with a separate bond executed by himself and a surety, for the full amount of the debt, *Rapelye v. Anderson*, 4 Hill, 472. A like rule seems to prevail in Connecticut, *Belden v. Lamb*, 17 Connecticut, 441; in Maine, *French v. Grindle*, 15 Maine, 163; *Lane v. Steward*, 20 id., 98; in Missouri, *Muldrow v. Agnew*, 11 Missouri, 616; and in South Carolina, *Brock v. Thompson*, 1 Bailey, 322. But the authorities agree, that the contract can be thus saved from the objection that it was usurious, only when the instrument transferred had a valid inception, in the hands of the transferor. And where the guaranty related to an instrument then in the hands of the guarantee, the latter is entitled to recover his full damages, notwithstanding the consideration may have been comparatively trifling in amount. *Cooper v. Page*, 24 Maine, 73; *Oakley v. Boorman*, 21 Wendell, 588; and so where, for any other reason, no question arises under the usury statutes. *Day v. Elmore*, 4 Wisconsin, 190.

charge of the debt.”(a) It was said in *Grove v. Dubois*, 1 Term Reports, 112, approved in *Bize v. Dickason*, id., 285, A. D. 1786, that the engagement which a factor, acting under such a commission, assumes to his principal, is absolute; and that he is liable in the first instance, the vendee being liable to the principal only collaterally, and as his surety; and a similar doctrine is supposed to be found in some other cases decided about the same time.(b) But afterwards the court of King’s Bench held distinctly in *Morris v. Cleasby*, 4 Maule and Selwyn, 566, A. D. 1816; and again in *Hornby v. Lacy*, 6 Maule and Selwyn, 166, A. D. 1817, that such a factor is merely the guarantor of the payment of the price, when it shall become due; or in other words that he is not liable to his principal in the first instance, but only in case of the purchaser’s default. And although there is still some confusion on the subject, it is believed that this ruling is now accepted, by the best authorities in both countries, as containing a correct exposition of the nature and extent of the factor’s liability.(c)

(a) Dunlap’s *Paley on Agency*, page 41. But this definition would be more exact, if the words “for a valuable consideration” were substituted for “in consideration of an additional premium.” In practice, the factor generally charges a specific commission for the guaranty, in addition to the ordinary commission on the sales. But this is not essential to constitute this species of contract; a factor may do no other than a *del credere* business, for which he charges only one rate. Nor is it essential that the consideration of the contract should be a rate or commission on the sale.

(b) *Houghton v. Matthews*, 3 Bosanquet and Puller, 485, p. 489, A. D. 1803; *McKenzie v. Scott*, 6 Brown’s Parliamentary Cases, 280, A. D. 1796.

(c) “The most important in a practical view to be here taken notice of, is the contract of guaranty by a factor, arising from the receipt of what is commonly called a *del credere* commission, (the nature whereof has been already stated,) by which he in effect becomes liable, in the case of a sale of goods, to pay to his principal the amount of the purchase money, if the buyer fails to pay it, when it becomes due. It has been sometimes suggested that this contract makes the factor the primary debtor to his principal on the sale. But this doctrine is unmaintainable, both upon principle and authority. [2 Kent’s Commentaries, pp. 624, 625, 4th edition; *Thompson v. Perkins*, 3 Mason, 232; *Gall v. Comber*, 7 Taunton, 558; *Peele v. Northcote*, 7 Taunton, 478; *Morris v. Cleasby*, 4 Maule and Selwyn, 566, 574; *Paley on Agency* by Lloyd, 41, note *d*; id., 111, note; *Leverick v. Meigs*, 1 Cowen,

§ 666. A leading author, writing soon after the decision in *Morris v. Cleasby*, says, referring to that case: "I think it clear that the *del credere* contract, so explained, is within the statute of frauds, and must be in writing." (d) But the rule is now settled the other way. Various rea-

645.] The true engagement of the factor in such cases, is merely to pay the debt, if it is not punctually discharged by the buyer. In legal effect he warrants or guaranties the debt; and thus he stands more in the character of a surety for the debt than as a debtor. Hence it is well established that he is not liable to pay the debt until there has been a default by the buyer. [*Morris v. Cleasby*, 4 Maule and Selwyn, 574.] Story on Agency, 5th edition, § 215. But in *Leverick v. Meigs*, 1 Cowen (New York), 645, Woodworth, J., said: "The only difference between a factor acting under a *del credere* commission, or without one, is as to the sales made. In the former case he is absolutely liable, and may correctly be said to become the debtor of his principal; but it is not strictly correct to say he is placed in the same situation as if he had become the purchaser himself; for, as we have seen, the principal, notwithstanding this liability, may exercise a control, not allowable between creditor and debtor. When the principal appears, the right of the factor to receive payment ceases. This shows that the effect of the commission is not to extinguish the relation between principal and factor, but applies solely to a guaranty that the purchaser shall pay. It is not a contingent liability, I admit, so as to require legal measures to be exhausted against the purchaser, before the factor is bound, but an engagement to pay on the day the purchase money becomes due. Although the factor is absolutely liable, he is not bound to pay until the money becomes due from the purchaser. It may therefore be more correctly laid down, that the factor under a commission becomes a debtor to his principal, with the limitations I have stated." The question which the learned judge was considering was whether a *del credere* factor was liable to guaranty the solvency of the drawer of a bill by which he had made a remittance to his principal, after the receipt of the money. He added: "It is only on this ground" (that the factor is the real purchaser) "that he can be bound to guaranty the remittance. This arises from the general principle, that the debtor is bound to make payment to his creditor, and consequently if he remits in bills which turn out of no avail, it is no payment. It does not discharge a precedent debt, unless it be so expressly agreed between the parties. The commission *del credere* does not make the agent cease to be a factor. He may be considered as a factor who has sold for cash. Beyond the engagement that the purchaser shall pay at the time agreed on, he is bound by no other law than a factor without a *del credere* commission." For other expositions of the nature of this liability, see the note to the next section, and the comments of the judges contained in various cases cited in the text of this article.

(d) Theobald on Principal and Surety, § 81.

sons have been given for this result ; many of which are far from being satisfactory. Thus it has been said, that the agent's contract is merely that he will exercise an increased diligence, beyond that which the law imposes upon him as a duty ; but as no amount of diligence, not even the entire solvency of the purchaser, will exonerate him, if the debt is not in fact paid, it is evident that his contract is not in any sense for his own act, but exclusively for the act of the purchaser. The doctrine that no promise is within the statute, when the leading object of the promisor was to benefit himself, has also been pressed into the service ; but, as the factor's only object is to pocket his reward, this doctrine, if it explains the ruling in this class of cases, goes to the extent of upholding every verbal promise to answer for the debt of another, if a distinct reward was paid to the promisor therefor ; a theory which we have commented upon at length in the preceding chapter. It has also been said that the factor is in legal effect the purchaser of the goods, for which he pays by an engagement that the persons to whom he shall resell the same, shall pay to his vendor ; a doctrine entirely inconsistent with the relative rights and duties of the principal and factor before the sale, and of the principal, factor, and purchaser afterwards. An analogy has also been drawn between the surrender of the goods by the owner to the factor upon his promise, and a similar surrender by the promisee who has a previous lien upon goods, in which the promisor has an interest. But this proves too much ; for there are few cases, where, upon the same theory, a verbal promise to pay the debt of another could not be sustained because the promisee relinquished the consideration ; and besides the authorities do not sustain a verbal promise, that another shall pay, based upon such a surrender. Other reasons have been assigned, amounting to but little more than to state in a different form, the proposition that the promise is not within the statute.(e)

(e) Many of these theories will be found in the extracts given from opinions in the cases cited in the text. Others are contained in the elementary books, from two of which we append extracts. In the sixth American

§ 667. But substantially the same reason suggested in the foregoing article, for sustaining a verbal guaranty of the payment of a debt transferred to the guarantee by the guarantor, will, it is believed, afford a satisfactory ground for taking also this class of engagements out of the statute; and it may be deduced from the opinions of the judges in some of the best considered cases. The *del credere* commission creates merely an increased liability, beyond that which the factor assumes by virtue^o of his employment; and it is a liability of the same general character, not a contract *ab origine*, to do that which the statute requires to be manifested by a writing. A general factor impliedly

edition of Smith's *Leading Cases*, volume I, page 489, the annotator (Judge Hare) says that the true explanation of the cases, which hold that the statute does not apply to sales on a *del credere* commission, may perhaps be found in the doctrine that any promise to pay the debt of another upon a consideration, no matter how disproportionate, moving to the promisor, is not within the statute; but the point cannot be considered as decided. However he afterwards adds (p. 494): "One of the reasons given for this conclusion is, that as agents are liable for good faith and due diligence in the transaction of the business confided to their care, a stipulation by which this liability is defined or even extended, cannot be regarded as a promise for the default of another, in the exclusive sense contemplated by the statute. But it would also appear, that a guaranty or insurance of a debt, for a percentage or commission, would be valid aside from this ground; on the general principle that a party who promises to pay the debt of another for value received, makes the debt his own, and cannot rely on the statute as a defence to an action, brought to compel the fulfilment of the engagement into which he has entered." In 1 *American Leading Cases*, fourth edition, p. 667, it is said: "The contract created by a *del credere* commission, is an independent contract between the principal and agent, separate from the sale, and not affecting the relations between the principal and the buyer, or those between the agent and the buyer. It is an absolute engagement by the factor, private between himself and the principal, and distinct from the sale which he makes, that the debts to which it refers shall be paid at the time they are due; or in other words, that they shall be cash in the principal's account, at the time they are due. Being an original and absolute engagement, it is not within the statute of frauds, and need not be in writing; and being an independent contract between the principal and agent, and in its legal effect a direct responsibility for the money due upon the sales, there need be no previous proceedings or recourse by the principal against the buyer, before he can charge the factor."

undertakes, among other things, to seek out a responsible purchaser, and to collect and remit the proceeds, when the period of credit, limited by his instructions, shall have expired; and he is answerable for any loss, in consequence of his default in any of these particulars. Such a default, in one sense, will render him liable for the debt or default of another; but no one would pretend that his undertaking would thereby be drawn within the statute of frauds. And the *del credere* factor assumes precisely the same liability; to which he superadds an agreement to guaranty the payment of the purchase price. This is merely an increase, in the same general direction, of his common law liability; as if a private carrier for hire, who is responsible by virtue of his employment for ordinary diligence only, should expressly assume some of the responsibilities of a common carrier, from which he would otherwise be exempt; as for instance, loss in consequence of defective roadways, or defective vehicles, etc., upon some line of travel. And while the factor's guaranty, if it stood alone, might be within the statute, neither the whole contract, nor this particular stipulation will be so affected, where the latter is merely an amplification of an undertaking to which the statute has no application.

§ 668. It may however be doubted whether the statute would apply, irrespective of these suggestions; for it is by no means clear that the transaction would satisfy the language of this clause. It does not appear to be a promise to answer for the debt or default of *any particular person*; for there was no debt in existence at the time the contract is made; not in the sense of Lord Mansfield's proposition in *Mawbrey v. Cunningham*, which he subsequently abandoned,^(f) but in the sense that there is no debtor, or person proposing to become a debtor, to whom the term "another person" can apply. Indeed no reason is perceived why a distinct class should not be added to those already recognized, where the promise is without the stat-

(f) Ante, §§ 144, 145.

ute because those words are not satisfied ; comprising not only del credere contracts, but all promises where the person, for whose debt or default the promisor undertakes to answer, is not designated at the time of the contract. If A undertakes to procure competent mechanics to build a house for B, and that it shall be completed by them in a certain time, and according to certain specifications, (it being perfectly understood that A is not to do any of the work himself,) in one sense A undertakes for their default or miscarriages ; but probably no one would doubt that the contract was not within this clause of the statute. That the reason is because the persons from whom A undertakes are not then in esse, for the purpose of the contract, will be apparent from the fact that if they had been designated at the time, and the undertaking was that they should perform, probably no one would doubt that it was within the statute. So in the case of a factor's contract with his principal. If the buyer was named, doubtless the statute would apply to a del credere contract ; and so if an ordinary factor, having already made a sale for his principal, should guaranty the payment of the price by the purchaser, for a new consideration passing between him and his principal.

§ 669. But as the authorities do not place the rule upon this ground, it is better, in order to preserve as much uniformity as possible, in this complicated branch of the law, to adhere to the other reason, which appears to be sufficient. The doctrine that the statute does not apply to a del credere contract originated in the United States ; although the English courts, as far as they have spoken, have also adopted it. The earliest case is *Swan v. Nesmith*, 24 Massachusetts (7 Pickering), 220, decided A. D 1828. There the action was against the factors in favor of their principals, to recover upon a verbal del credere agreement ; and at the trial it was held that it was not within the statute, and the plaintiffs had a verdict. A motion for a new trial was denied, Parker, C. J., delivering the opinion of the court. He said that the legal effect of the contract was to make the defendants liable at all

events for the proceeds of the sale, so that, according to some authorities, they may be charged on *indebitatus assumpsit* for goods sold and delivered; and although this was denied by others, the form of the action was not material, as they cannot be sued till after the sale, and the expiration of the term of credit. He added, that some of the principles laid down in the earlier cases, touching the liability of factors under such a commission, had been questioned; "but it seems nowhere to be required that a guaranty of this nature should be in writing, for the liability is admitted to be original; and although the vendor may in such case forbid payment to the agent, if he is insolvent, and maintain an action for himself, which in other cases is held to be the distinctive mark of a collateral undertaking, yet in this particular contract such a privilege to the vendor is held not to alter the nature of his claim upon the factor."

§ 670. The same opinion was expressed in the United States Circuit Court for the district of Vermont, in *Bradley v. Richardson*, 23 Vermont, 720, A. D. 1851, although no question under the statute was directly involved in the decision. The plaintiffs moved for an injunction, upon a bill filed to stay the collection of certain judgments against a corporation; alleging that they were creditors and stockholders of the corporation, and interested in certain property, upon which the judgments were liens. One of the objections to the judgments, on which they relied, was that in the account between the defendants and the corporation, the latter had not been credited with the amount of certain sales of goods upon an unexpired credit; which the defendants had effected, as the factors of the corporation, under a *del credere* commission. Upon that question Prentiss, J., denying the motion for an injunction, said that it was once a question whether a factor who sold goods on credit, did not become immediately liable to the principal; yet the question was now settled that his undertaking was merely to answer for the solvency of the buyers, or rather to guaranty to the principal the pay-

ment of the debts due to him from the buyers; and that he was liable only, if the buyers failed to pay the purchase money when it became payable. He added: "Some confusion has arisen upon this subject, from the decisions on the question whether the undertaking of a factor is a contract within the statute of frauds, and so must be in writing. The better opinion is that it need not be in writing; that though a guaranty, it is not a collateral engagement, but an original and absolute one, that the prices for which the goods are sold or the debts created by the sales of the goods, shall be paid to the principal, when the credit given on the sales shall have expired."

§ 671. The question had previously received a thorough examination in the State of New York, in two cases which were ultimately decided in the court of last resort. In *Wolff v. Koppel*, 5 Hill, 458, A. D. 1843, the plaintiff had sued in the New York Common Pleas, to recover the price of certain goods sold by the defendants, as factors under a del credere commission. The agreement was verbal, and the defence was that it was void by the statute of frauds. The plaintiff having recovered judgment in the Common Pleas, the defendants brought error to the Supreme Court, where the judgment was affirmed. Cowen, J., delivering the opinion of the court, said that the only authority in favor of holding the promise to be within the statute, grows out of the nature of the contract, as held by the King's Bench in *Morris v. Cleasby*, 4 Maule and Selwyn, 566, which defines the liability differently from what the previous cases had done, asserting that the factor is a guarantor of the debts created; that is to say that they are due to the merchant, and the factor's engagement is secondary and collateral, depending upon the debtor's default. Thereupon some of the English text writers assert that the contract is within the statute; but others assert the contrary opinion, founding it upon the former cases, holding that the factor was the primary debtor, which are overruled by that decision. He added that in *Swan v. Nesmith*, the Supreme Court of Massachusetts, whether

or not they were aware of the decision in *Morris v. Cleasby*, were aware of the rule laid down in that case, and considered the obligation as a guaranty ; but notwithstanding they held that it was not within the statute.

§ 672. "But," he continued, "a guaranty, though by parol, is not always within the statute. Perhaps, after all, it may not be strictly correct to call the contract of the factor a guaranty, in the ordinary sense of that word. The implied promise of the factor is merely that he will sell to persons in good credit at the time ; and in order to charge him, negligence must be shown. He takes an additional commission, however, and adds to his obligation that he will make no sales unless to persons absolutely solvent ; in legal effect, that he will be liable for the loss which his conduct may bring upon the plaintiff without the onus of proving negligence. The merchant holds the goods, and will not part with them to the factor without this extraordinary stipulation, and a commission is paid to him for entering into it. What is this, after all, but another form of selling the goods ! Its consequences are the same in substance. Instead of paying cash, the factor prefers to contract a debt or duty which obliges him to see the money paid. This debt or duty is his own, and arises from an adequate consideration. It is contingent, depending on the event of his failing to secure it through another, some future vendee, to whom the merchant is first to resort. Upon nonpayment by the vendee the debt falls absolutely on the factor." And, he added, whatever may be the form of the principal's action against the factor, it is brought to recover the factor's own debt.

§ 673. Referring then to several cases, in which it had been held that a promise, though in form to pay the debt of another, is not within the statute ; as where the promisor assigns a third person's promissory note and guaranties its collection ; or where the promise is made to the debtor himself ; or where the consideration of the promise is the surrender of a lien. fund. or security ; he concluded : "The

merchant gives up his goods to be sold and pays a premium. Is not this in truth as much and more than many of those cases require which go on the relinquishment of a security? Suppose a factor agrees by parol to sell for cash, but gives a credit. His promise is virtually that he will pay the amount of the debt he thus makes. Yet who would say his promise is within the statute! The amount of the argument for the defendant would seem to be, that an agent for making sales, or indeed a collecting agent, cannot, by parol, undertake for extraordinary diligence, because he may thus have the debt of another thrown upon him. But the answer is, that all such contracts have an immediate respect to his own duty or obligation. The debt of another comes incidentally as a measure of damages."

§ 674. A writ of error upon this judgment was brought by the defendants, and the decision of the Court of Errors thereon (A. D. 1845,) is reported in *Wolff v. Koppel*,² Denio, 368. Porter, Senator, delivered the prevailing opinion of the court, contending that the question should be regarded as settled by the current of decisions which prevailed before *Morris v. Cleasby*; the rule in which he characterized as a recent innovation, which had never been adopted in this country; and he thought that the American courts ought not to follow the English courts in their departure from the former rule. These contracts, he said, have existed in this country as long as commerce has flourished, and the understanding of the mercantile community has been general and uniform that the factor's agreement "was original and absolute to pay the price of the sale, deducting the commission, at the time the credit expired," although he doubtless expected to receive the fund from the purchaser. Hand, Senator, dissented and delivered an opinion arguing very ably, upon principle as well as upon authority, that the factor's undertaking is collateral merely. But a decided majority of the court concurred with Senator Porter, and so the judgment of the Supreme Court was affirmed.

§ 675. The question came before the New York Court of Appeals in the year 1856, in *Sherwood v. Stone*, 14 New York (4 Kernan), 267, the facts being substantially the same as in *Wolff v. Koppel*, and the decision in that case was followed by the unanimous vote of the court. Johnson, J., delivered a short opinion favoring the affirmance of the judgment, upon the principle of stare decisis. Mitchell, J., said that at the time when the State constitution adopted the common law, the rule upon this subject was settled by the two cases in the first of Term Reports, and the subsequent English decisions cannot alter the law. He thought that the contrary results were produced by the different views of the contract taken in the two countries; in England it is understood to be a contract to pay, if the money cannot be collected of the purchaser; but in the United States it is understood to be a contract to pay at the expiration of the term of credit, whether the purchaser be solvent or not; that is, an original undertaking, without any reference to the debt or liability of another. The principal's right to sue the purchaser is a quality added by the law, and not the contract of the parties; and the factor has also a right to sue. The factor's guaranty also differs from a promise to pay the debt of another in another particular, that the principal transfers to him a right to sue for the debt in his own name, accounting only for the net balance of the account; which shows that to some extent the purchaser's debt is made the property of the factor, and he becomes to that extent the purchaser of it, and so far substitutes his own liability for that of the purchaser. The effect of this is generally to make the factor practically the owner of the debt, and this is invariably so if he remains solvent, and on just terms with his principal.

§ 676. But the apprehension, expressed in all these cases, that the ruling respecting the application of the statute would conflict with that of the English courts, has apparently proved unfounded; and the latter have been able to reconcile the decision in *Morris v. Cleasby*, with a ruling

that the contract of the factor is not within the statute. At least such would appear to be the case, from the decision of the Court of Exchequer in *Couturier v. Hastie*, 8 Exchequer, 40, A. D. 1852.(g) There a cargo of corn had been shipped by the plaintiffs at Salonica for London, and sold by the defendants as their factors on a del credere commission; but in fact at the time of the sale the corn had become so damaged, that it had been condemned at an intermediate port and sold there; and on this intelligence reaching England the purchaser repudiated the sale, and subsequently became bankrupt; whereupon the plaintiffs brought this action against the factors. Several points were made for the defence, and among others, that the defendants' del credere contract was within the statute of frauds, the only written evidence of it being a letter which did not comply with the requirements of the statute. At the trial the judge ruled that the defendants' undertaking was not within the statute; but that the contract imported that the corn was in existence as such, and capable of delivery, and upon the latter ground the defendants had a verdict. This was set aside and a verdict ordered to be entered for the plaintiffs, after argument in term.

§ 677. Parke, B., assigned the following reasons for holding that the defendants were liable on the del credere contract. "Doubtless if they had, for a percentage, guarantied the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable without a note in writing signed by them: but being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not; and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the

(g) S. C. 22 Law Journal, N. S., Exchequer, 97.

solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them ; and though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given ; and the case resembles in this respect those of *Williams v. Leper* and *Castling v. Aubert*. We entirely adopt the reasoning of an American judge (Mr. Justice Cowen) in a very able judgment on this very point in *Wolff v. Koppel*, 5 Hill, 458." (h)

§ 678. In the subsequent case of *Wickham v. Wickham*, 2 Kay and Johnson, 478, decided A. D. 1855, Vice Chancellor Page Wood regarded the decision of the Exchequer in *Couturier v. Hastie*, upon the effect of the statute of frauds, as not only satisfactory in its reasoning but binding as authority ; notwithstanding that the decision had then been reversed on the other point in the Exchequer Chamber. In the case then before him, the Vice Chancellor came to the conclusion, upon a careful examination of the facts, that the contract was a primary engagement on the part of the factors, to make good the payments at the end of every year for the goods supplied by the principals ; but he distinctly said that if the contract was for a del credere agency, he concurred with what was urged by the plaintiffs' counsel, that *Couturier v. Hastie* established that it would not operate as a guaranty, and would not be a promise to

(h) The judgment rendered for the plaintiffs upon the decision was reversed on error in the Exchequer Chamber, *Hastie v. Couturier*, 9 Exchequer, 102, A. D. 1853 (S. C., 17 Jurist, 1127 ; 22 Law Journal, N. S., Exch., 299), and the latter decision was affirmed in the House of Lords, *Couturier v. Hastie*, 5 House of Lords Cases, 673, A. D. 1856 (S. C., 2 Jurist, N. S., 1241 ; 25 Law Journal, N. S., Exch., 253) ; but in each of the appellate courts the decision was put upon the ground, that the terms of the contract between the defendants and the purchaser imported, that at the time it was entered into, the corn was existing, in a state to be bought, sold, and delivered ; and the opinion expressed by the Court of Exchequer, respecting the validity of the defendants' contract with the plaintiffs, under the statute of frauds, was not brought in question.

answer for the debt of another, within the fourth section of the statute of frauds. He added: "When I look at the whole of that case, and consider the reasons given by the judges in delivering their judgments, though given very cautiously and guardedly, I cannot but conclude that they considered that an agent, entering into a contract in the nature of a *del credere* agency, entered in effect into a new substantial agreement with the persons whose agency he undertook; that the agreement so entered into by him was not a simple guaranty, but a distinct and positive undertaking on his part, on which he would become primarily liable; otherwise I cannot see how the learned judges could arrive at the conclusion that the undertaking was not within the statute of frauds. Certainly the opinion of the American judge, which one of the learned judges referred to with approbation, in delivering his judgment in *Couturier v. Hastie*, goes to the full extent which I have described." (i)

§ 679. The opinion of Lord Wensleydale in *Couturier v. Hastie* is particularly worthy of attention, because he assigned as a reason for his conclusion, that the principal object of the plaintiffs in giving the reward, which formed the consideration of the promise, was not to create a liability on the part of the defendants to answer for the debt of another. We have already expressed our opinion in support of the proposition, that where the leading object of the transaction was not to create such a liability, the statute does not apply; and have pointed out the difference between that principle and the doctrine which we have condemned in the preceding chapter. (j) It was then remarked, that the essential point of difference between the two was that the latter suffered both parties to have such a common object; and the promisee to

(i) *Couturier v. Hastie* is also cited in the eighth edition of Chitty on Contracts, p. 196 (A. D. 1868), as settling the law that a factor's engagement under a *del credere* agency need not be in writing.

(j) *Ante*, §§ 615, 616.

have it for his leading object. It will be noticed that this distinguished judge applied precisely this test to the case then before him, where the effect of a guaranty of a debt thereafter to be created was in question; thereby sanctioning our conclusion, that it is only when *both parties* contemplate something different from the assumption of liability for a third person's debt, default, or miscarriage, that the contract will not be within the statute. That his Lordship did not intend to lay down any general rule like the proposition, the fallacy of which we have labored to demonstrate, is apparent from his pointed condemnation of one of its inevitable consequences, which furnishes the aptest illustration of its mischievous tendency; namely, the exclusion from the operation of the statute of a simple guaranty of another's debt, founded upon a distinct pecuniary consideration, paid by the creditor to the guarantor.

PART THIRD.

**OF AGREEMENTS MADE UPON CONSIDERATION
OF MARRIAGE.**

CHAPTER NINETEENTH

CASES WITHIN THE THIRD CLAUSE OF THE FOURTH SECTION OF THE STATUTE.

ARTICLE I.

Object, effect, and true interpretation of this clause.

§ 680. The third clause of the fourth section, which provides that no action shall be brought "TO CHARGE ANY PERSON UPON ANY AGREEMENT MADE UPON CONSIDERATION OF MARRIAGE," unless it shall be manifested by a writing, was probably inserted as one of the amendments, which, as we have seen, were added to the original draft of the bill, during its passage through the two houses of Parliament.^(a) This is indicated, not only by the structural peculiarities of the section, which render the words "to charge any person" tautological; but also by the fact that the agreements to which the second, fourth and fifth clauses relate, are described therein according to their form or subject matter; whereas the third adopts the consideration as the distinguishing feature of those embraced within it. Perhaps also it would not be incorrect to say, that the danger of fraud and perjury in the attempt to establish agreements of this character, was not the principal reason why the legislature required them to be committed to writing. We may rather attribute this provision to an apprehension of the evils to result, from permitting every promise relating to property, which may have passed, during courtship, between the future husband and wife, and every expression of intended bounty, which may have fallen from the friends of either, to be made the foundation of an action after marriage, even where no fraud was

^(a) See note to § 3, ante.

designed, and no perjury committed. These constitute the agreements which the statute was intended to embrace; and except for its provisions, they are, like other executory agreements, as valid and as capable of enforcement, when they were merely verbal, as when they were in writing. (b)

§ 681. With respect to promises looking to a provision for the future husband or wife, made prior to or during the engagement, by the relatives or other friends of either, the policy of the statutory requirement of a writing rests upon very clear and satisfactory grounds. Nothing is easier than a mutual misunderstanding in a transaction of this kind; where declarations vaguely made, as mere expressions of an idea entertained, but not matured into a resolution, are very apt to be regarded by the person to whom they are addressed, as positive promises. Experience has proved that it is often difficult to ascertain, even when the evidence consists of correspondence, or other informal writings, whether such expressions ever assumed the form of a definite and unconditional undertaking. It is therefore only reasonable, that the law should require the most satisfactory evidence, of which the nature of the case admits, that a binding promise of that character was actually intended to be made; before compelling the promisor to give effect, to what is almost invariably a mere act of bounty on his part.

§ 682. But there is much greater room for doubt, whether it was wise and just to require promises relating to property, passing between the future husband and wife, to be manifested by a writing. It is true that, to some extent,

(b) Sir Ralph Bovy's case, 1 Ventris, 193, 24 Car. ii; *Lavender v. Blackstone*, 2 Levinz, 146, 27 Car. ii; Sir John Otway's case, cited in *Gell v. Vermedun*, Freeman's Chancery Reports, 199. And in the United States, *Flowers v. Kent*, Brayton (Vermont), 238, A. D. 1817, before the Vermont statute; *Dunn v. Tharp*, 4 Iredell's Equity (North Carolina), 7; *Montgomery v. Henderson*, 3 Jones's Equity (North Carolina), 113; *Gackebach v. Brouse*, 4 Watts and Sergeant (Pennsylvania), 546.

the same reasons are applicable to this species of promise, by which the policy of the statute with respect to promises by relatives can be successfully defended. And doubtless the existence of a right, on the part of either of the married couple, to call upon a court of equity to enforce a promise made by the other, under circumstances so unfavorable to free and deliberate action as those attending a courtship, would have some tendency to destroy the peace of families, and would occasionally lead to injustice. But, on the other hand, the nature of the matrimonial rights over property, which the common law creates, are such, that in practice the person who has any occasion to exact or receive any promise in relation thereto, is almost invariably the one of whom the law should be peculiarly tender, by reason of her inexperience, her comparative helplessness, and her proneness to excessive confidence. And the books contain abundant evidence, that in this class of cases, the statute has generally had the effect to enable those sources of weakness to be successfully practiced upon; and thus to promote fraud and injustice. But this objection has now been removed, in most of the United States, by acts which place a wife's rights, with respect to property, at least upon a level with those of the husband.

§ 683. The clause under examination applies only to "any *agreement* made upon consideration of marriage;" and it is therefore not applicable to *representations*, with respect to which the courts have continued, since the enactment of the statute, to administer the law as before, notwithstanding that such representations may have been merely oral. It is quite evident that the enforcement of a representation, made for the purpose of inducing the completion of a marriage, will frequently have the same practical effect as the enforcement of an agreement in consideration of the marriage. Hence the exclusion of representations from the operation of this clause of the statute, is apparently open to the same objections which were interposed so vigorously, although unsuccessfully, to their

exclusion from the operation of the second clause of the same section. (c) But, in this class of cases, those objections seem to have been overlooked, until quite recently; although Lord Eldon, (who was conspicuously hostile to the established doctrine in the cases under the second clause), in giving judgment in *Ex parte Carr*, 3 Vesey and Beames, 108, A. D. 1814, said that the rule laid down in *Pasley v. Freeman*, 3 Term Reports, 51, (d) "has some authority" in the rule established in this class of cases. The doctrine that the statute does not apply to representations, seems therefore to have been settled without opposition.

§ 684. Accordingly we find several cases, where a person who has made an oral representation, knowing it to be false, upon the faith of which a marriage has taken place, has been compelled to make it good by the decree of a court of equity; and some where redress has been granted at law. Indeed it appears to be well settled, that the principle goes to the length of permitting the husband or the wife to maintain an action for that purpose, although the plaintiff was a party to the intended deception, whenever it is necessary to do so, in order to prevent injury to the innocent party, or to the issue of the marriage.

§ 685. Thus, in *Neville v. Wilkinson*, 1 Brown's Chancery Reports, 543, A. D. 1782, it appeared that Mr. Neville, one of the plaintiffs, being about to marry the daughter of the plaintiff Robinson, induced the defendant, who was his agent, to make out a schedule of his debts to show to Mr. Robinson, concealing the fact that he owed the defendant and another person a very large sum; and to represent to Mr. Robinson that the schedule contained all his debts. Thereupon the marriage took place; Mr. Robinson having previously made provision, by a deposit in the names of the trustees under the marriage settlement, for the payment of all the debts named in the schedule. And upon a bill filed

(c) Chapter iv, article ii.

(d) Ante, § 102.

by Neville, Robinson, and the person who was joined with Robinson as a trustee in the marriage settlement, Lord Thurlow granted an injunction to restrain the defendant from proceeding to recover his debt against Mr. Neville. (e)

§ 686. But this case, and the others of the same general character, seem to depend upon the existence of a fraudulent intent on the part of the person making the representation; and therefore present no difficulties in the way of reconciling the principles of equity with the provisions of the statute. The perplexity arises where no such element was present. The rule appears to be now settled, at least in England, that the right to relief does not necessarily depend, even upon knowledge of the falsity of the representation, much less upon a fraudulent intent. And as some of the cases have practically almost effaced the distinction between a representation and a contract, for the purpose of administering equitable relief; questions of great difficulty have arisen, where a relative or friend of a person contemplating matrimony, has made an oral statement of an intention to make a provision for the engaged couple; and the marriage has been consummated, in reliance upon that statement. The examination of these questions will be deferred to the next chapter, where it can be more conveniently examined, in connection with other questions growing out of the equitable doctrine of performance. (f)

§ 687. It will be noticed that the consideration mentioned in the statute is *marriage*; but from the necessity of the case, the promise which is the subject of an action

(e) See also *Redman v. Redman*, 1 Vernon, 348, A. D. 1685; *Gale v. Lindo*, id., 475 (1687); *Lamlee v. Hanman*, 2 Vernon, 466 (1704); *Turton v. Benson*, 2 Vernon, 764 (1718); *Roberts v. Roberts*, 3 Peere Williams, 66 (1730); *Montefiori v. Montefiori*, 1 W. Blackstone, 363 (1762); *Thompson v. Harrison*, 1 Cox's Chancery, 344 (1787); *Scott v. Scott*, id., 366; *Palmer v. Neave*, 11 Vesey, 165 (1805).

(f) See chapter xx, article iii.

must always have preceded the actual marriage. Generally there were in fact mutual promises between the parties ; a promise of marriage on the part of the plaintiff, (or the person from whom he derives his cause of action,) having accompanied the promise which he seeks to enforce. This happens, not only when the promise, which is the subject of the action, passed between the future husband and wife, but also when it consisted of the agreement of a third person to provide a marriage portion ; inasmuch as the interest, which the person engaging to give the portion feels in the accomplishment of the marriage, constitutes almost invariably his motive for making such an agreement.

§ 688. For these reasons the true meaning of the statutory expression has been sometimes misunderstood, thereby opening the door to errors of considerable magnitude. It has been said that a promise to marry forms the consideration of what is technically called an antenuptial agreement, and consequently that such an agreement is made in contemplation of marriage, not in consideration of marriage.^(g) But while it is undoubtedly true that every antenuptial agreement, so called, is made in contemplation of marriage, the only legitimate conclusion, to which that circumstance leads, is that no such contract is within the statute, unless it was also made in consideration of marriage. And it is believed that a careful examination of the subject will show, that where an agreement to do some act, at the time of, or after the marriage, (as to provide a portion,) was made, in consequence of a promise by the other party to marry, the real *consideration* was the marriage, and not the promise ; although the latter may have been the *inducement* to the agreement.

§ 689. This will be apparent, if we take a case where there was no corresponding promise to marry. There the

(g) Per Benning, J., in *Durham v. Taylor*, 29 Georgia, 166, cited in note to § 720 post ; and see *Riley v. Riley*, 25 Connecticut, 154, and comments thereon, post §§ 714-716.

promise to provide a portion is a mere proposal, which takes effect as a contract, only when a consideration, that is the marriage, has been furnished by the other party. (h) It is precisely like a contract between A and B, to the effect that A will pay B a specified sum for building a certain house. Here the actual building of the house is the consideration of A's promise to pay. And it is none the less the true consideration, that B may have undertaken, on his part, to build the house for the money; or that, in either case, it is also a condition precedent to B's right to maintain an action. Indeed the contrary hypothesis would lead to the conclusion, that if property had been placed in the hands of one of the parties, in part performance of an antenuptial agreement, and the match should afterwards be broken off by death, or even by the refusal of either party to complete it, the property could not be recovered back.

§ 690. With some inconsiderable exceptions, the construction of this clause has been in strict accordance with the foregoing principles. In some of the cases to be cited in the following pages, contracts, made in contemplation of marriage, were excluded from the operation of the statute, because they were made upon some consideration other than marriage, or in addition thereto. And on the other hand, we shall cite several cases, where similar contracts have been held to be within the statute, because they were not founded upon any such distinct consideration, although it is to be inferred that they were accompanied with promises to marry. This is evidently the result which the statute aimed to accomplish; and it is difficult to suggest any form of words, which will express

(h) It has been held that a promise to provide a marriage portion needs no other acceptance, than the consummation of the marriage in pursuance of its terms. *Parker v. Serjeant*, Cases tempore Finch, 146; *Moore v. Hart*, in note to § 691; *Greene v. Cramer*, 2 Connor and Lawson, 54; S. C., sub nom. *Saunders v. Cramer*, 3 Drury and Warren, 87; *Luders v. Anstey* 4 Vesey, 501; *De Beil v. Thomson and Hammersley v. De Biel*, cited post §§ 744-747.

the idea thus intended to be conveyed, so clearly and at the same time so tersely, as those which were actually used.

§ 691. It would seem to follow, from this analysis of the legal effect of this species of agreement, that if the promise rested only upon the consideration of the future marriage, the person making it may withdraw it at any time before the actual celebration of the marriage, whether it was in writing, or merely verbal, and whether it was or was not accompanied with a promise to marry. And although we are not aware that the point has ever been expressly decided, it has been assumed in several cases that such a withdrawal will protect him against a suit in equity for specific performance.⁽ⁱ⁾ But agreements of this kind are of such a peculiar and exceptional character, that in some cases equity will interfere to compel a specific performance, after

(i) It was apparently taken for granted, in the case of *De Beil v. Thomson*, and *Hammersley v. De Biel*, post, §§ 744-747, that the father might have withdrawn his proposal at any time before the actual marriage; but, under the construction which the court put upon the memorandum, it may be doubted whether he could have done so, after the Baron and his brother had executed the settlement of 500*l.* per annum. In *Moore v. Hart*, 1 Vernon, 201, A. D. 1683, the defendant had written to one Mr. Reeve, a relation of the plaintiff, at whose house his daughter was visiting, a letter promising a portion, on the occasion of her marriage with the plaintiff, and more after his death; and the plaintiff married the daughter, in reliance upon that letter. But upon a bill filed for the portion, the defendant in his answer said that Mr. Reeve had answered the letter, to the effect that he was not satisfied with the amount which the defendant proposed to leave at his death, and would have nothing further to do with the match; whereupon the defendant had renewed a treaty with another gentleman, which had been broken off; and while that treaty was pending, the plaintiff and his daughter intermarried at Mr. Reeve's house, without his consent. It was proved, however, that Mr. Reeve did not communicate to the plaintiff the contents of his last letter; and that after the defendant had received it, he came to town purposely about the match, and said to others, with many imprecations, that he would make his promise good. And the Lord Keeper (North) thereupon made a decree for the plaintiff; though for the defendant it was urged, that this promise in writing, being discharged by a subsequent letter in writing, could not now be renewed by parol disclosures.

the marriage has taken place; although before that event the promisor had expressly withdrawn his promise, and no pecuniary injury would have ensued to the promisee if he had refused to complete the marriage. This jurisdiction rests, not upon the idea that a general right to withdraw is inconsistent with the legal effect of the transaction, but upon the familiar ground, that the party has been induced, by his reliance upon the promise, to place himself in such a position that he cannot be restored to his former condition. The peculiarity of the application of the principle, under these circumstances, is that the court regards the wound which his affections will sustain, by breaking off the match, as sufficient to entitle him to insist upon the performance of the agreement.

§ 692. Thus, in *Wanchford v. Fotherly*, Freeman's Chancery, 201, A. D. 1694, the plaintiff filed a bill for a portion of 3,000*l.*, to be paid upon his marriage with the defendant's daughter. It appeared that a letter, offering that portion, was written by a friend of the plaintiff, with the defendant's assent, and that he afterwards agreed to it. Accordingly there was a treaty with the defendant for such a settlement; "but the treaty depending long, the young couple married." "And," the report proceeds, "although it appeared that Mr. Fotherly, before they went to church, did declare that he would give them nothing, and the statute of frauds and perjuries was insisted upon, yet decreed for the plaintiff, although his wife is since dead, and he married to another. And the Lord Keeper" (Lord Somers) "said, for his countermand when they were ready to go to church, he looked upon it as nothing, after the young people's affections were engaged." This decree was afterwards affirmed, upon appeal to the House of Lords. (j)

(j) The case is also reported under the title of *Wankford v. Fotherley*, in 2 Vernon, 322, and as *Wankford v. Fotherby*, in 1 Equity Cases Abridged, 22. But neither of these reports mentions the countermand. The bill was filed by the husband, as administrator of his deceased wife. The very short case of *Douglas v. Vincent*, 2 Vernon, 202, A. D. 1690, has been supposed to conflict somewhat with the principle of *Wanchford v. Fotherley*. The

§ 693. It must be acknowledged that this principle requires considerable delicacy in its application, in order to avoid abuses. But it finds a very close analogy in a similar doctrine, which seems to be well settled, in cases where a forfeiture of an estate results from the marriage of the beneficiary, without the consent of some other person. It is held, that where such a consent has once been given, and the affections of the young people have been permitted to become enlisted, the consent cannot be withdrawn, unless for some cause which the court shall adjudge to be reasonable. In the language of Lord Northington, "it would otherwise be a most cruel thing to suffer young persons to contract and entertain affection, and then *ad libitum* withdraw the consent." (k)

report of the case is as follows: "The bill being for 1,000*l.*, as promised by Sir Matthias Vincent with his niece, by a letter under his hand, but in the same letter he dissuaded her from marrying the plaintiff, yet was afterwards present at the marriage, and gave her in marriage. In this case the court would not decree the payment of the 1,000*l.*, but left the plaintiff to bring his action to recover it, *as he could at law.*" It is possible that the last five words were intended to mean, that there was no impediment to his recovering the 1,000*l.* at law; for which reason, it was not proper for him to come into equity. See *Chichester v. Cobb*, 14 *Law Times*, N. S., 433. It would seem that, in *Douglas v. Vincent*, the wife must have died, otherwise she should have been a party. In *Madox v. Nowlan*, Beatty, 632, decided in the Irish Court of Chancery, in 1824, Lord Manners referred to the case of *Wanchford v. Fotherly*, which had been pressed upon him by counsel, but without expressing any approbation or disapprobation of the principle upon which it proceeded; for he came to the conclusion that the defendant's promise, which had been withdrawn on the morning of the plaintiff's marriage, was conditional by its terms, and that the condition had not been performed. Lord Cottenham cited the case approvingly in his judgment in *Hammersley v. De Biel*, post §§ 744-747.

(k) *Merry v. Ryves*, 1 *Eden*, 1. See also *Lord Strange v. Smith*, *Ambler*, 263; *Campbell v. Lord Netterville*, cited in 2 *Vesey*, Senior, 534; Per Lord Eldon, in *Clark v. Parker*, 19 *Vesey*, 12, 13; Per Sir William Grant, in *D'Aguilar v. Drinkwater*, 2 *Vesey* and *Beames*, 225.

ARTICLE II.

Nature and extent of the marriage consideration; what persons are entitled to avail themselves of it.

§ 694. Our proposed examination of the questions presented, in the cases which have arisen under this provision of the statute, may be usefully prefaced by a few remarks upon the nature and extent of the consideration, forming the test of its application; and a glance at the rules which determine what persons are entitled to rely upon the marriage, as a consideration furnished in their behalf. Such persons are said to be within the scope of the consideration.

§ 695. The authorities agree in regarding a marriage as fulfilling all the requisites of a valuable consideration; and consequently that the parties thereto, and all other persons who come within its scope, are entitled to the most ample protection which a court of law or equity will give to purchasers for value.(a) Accordingly it has been

(a) Lord Coke remarks that "there is no consideration so much respected in the law as the consideration of marriage, in respect of alliance and posterity." Coke upon Littleton, 9 b.; Thomas's edition, volume 1, page 501. Lord Romilly says that "the consideration of marriage is the highest known to the law." *Ford v. Stuart*, 15 Beavan, 499. Lord St. Leonards also speaks of marriage as "the most valuable of all considerations." *Greene v. Cramer*, 2 Connor and Lawson, 60; S. C., sub nom. *Saunders v. Cramer*, 3 Drury and Warren, 87. Sir John Stuart says that "it is the policy of the law to give paramount force to the consideration of marriage." *Fraser v. Thompson*, 1 Giffard, 62. And see to the same effect, *Peachey on Marriage Settlements*, 56, 57; *Addison on Contracts*, 6th edition, 740; *Per Collier, C. J., Andrews v. Jones*, 10 Alabama, 421; *De Barante v. Gott*, 6 Barbour (N. Y.), 492; *Marshall v. Morris*, 16 Georgia, 368; *Per Archer, J., Buchanan v. Deshon*, 1 Harris & Gill (Maryland), 292; *Crane v. Gough*, 4 Maryland, 316; *Magniac v. Thompson*, 7 Peters (U. S.), 348; *Brown v. Carter*, 5 Vesey, 862, 879. And see *Barrow v. Barrow*, 2 Dickens, 504. In *Sterry v. Arden*, 1 Johnson's Chancery, 271, Chancellor Kent, referring to a voluntary conveyance to the female plaintiff, upon the faith of which the plaintiffs had intermarried, said: "The marriage was a valuable consideration, which fixed the interest in the grantee against all the world; she is regarded from that time as a purchaser, and as much

held that if a person has been induced to marry the grantee in a voluntary deed, in consequence of the credit which such grantee may have gained by means of the deed, it ceases to be voluntary, and becomes good against a subsequent purchaser for value. (b) This rule is strikingly illustrated by an English equity case, where a father gave a voluntary bond to trustees, conditioned for the payment, after his death, of a sum of money for the benefit of his six children, in certain specified proportions. Afterwards two of the sons named in the bond, assigned, in contemplation of marriage, their respective portions of the sum payable by the condition thereof, to other trustees, for the benefit of their intended wives respectively; and on the faith of those assignments, the marriages were contracted. Many years afterwards, the father died insolvent; and upon a settlement of his estate, the trustees to whom the bond was given, were admitted as specialty creditors to the amount payable, by the condition of the bond, to the two sons who had married. (c) So, under the statute of the 27th Elizabeth, a grantee in consideration of marriage may impeach, as a purchaser for value, a prior voluntary grant of the same property. (d)

§ 696. The effect of a postnuptial settlement as against the creditors of the settlor will be the subject of examination in the next succeeding article. But it is an estab-

so, as if she had then paid an adequate pecuniary consideration." And in *Dugan v. Gittings*, 3 Gill (Maryland), 157, Martin, J., speaking of the verbal gift of real property by a father to his daughter, in contemplation of the latter's marriage said: "The consummation of the marriage, in a case like this, is to be considered as equivalent to the payment of the purchase money in a pecuniary contract; in both cases the consideration is discharged."

(b) *Sugden on Vendors*, 14th edition, 720, and cases cited; *Whelan v. Whelan*, 3 Cowen (N. Y.), 537; Per Lord Ellenborough, C. J., in *Doe v. Manning*, 9 East, 69; *Sterry v. Arden*, 1 Johnson's Chancery (N. Y.), 261; S. C. on appeal, sub nom. *Verplanck v. Sterry*, 12 Johnson, 536.

(c) *Payne v. Mortimer*, 28 Law Journal, N. S., Chancery, 437; and on appeal, id. 716, A. D. 1859; S. C. 1 Giffard, 118; 5 Jurist, N. S., 307; and on appeal, 4 De Gex and Jones, 447, and 5 Jurist, N. S., 749.

(d) *Jordan v. Money*, 5 House of Lords Cases, 185, cited post, §§ 752-754.

lished principle that an antenuptial settlement is valid against them, if the marriage took place on the faith of it; all persons within the scope of the consideration, being then regarded as purchasers for value. This principle has been often applied in cases where a settlement has been made by a debtor upon his intended wife.^(e) Of course actual fraud, in which the grantee or beneficiary participated, will avoid the whole transaction; and the degree of good faith, which must have existed on the part of the wife, in order to prevent the settlement from being regarded as fraudulent, has been the subject of much discussion. It has been intimated that she would not be protected, if the settlement was very extravagant, either in its terms or with respect to the quantity of the property embraced within it.^(f) But the most recent English cases

(e) *Magniac v. Thompson*, 7 Peters (U. S.), 348; *Nairn v. Prowse*, 6 Vesey, 752, 759; *Campion v. Cotton*, 17 Vesey, 264; *Wood v. Jackson*, 8 Wendell (N. Y.), 9. This principle appears to have been overlooked in *Page v. Kendrick*, 10 Michigan, 300.

(f) In *Hardey v. Green*, 12 Beavan, 182, A. D. 1849, (S. C., 13 Jurist, 777; 18 Law Journal, N. S., Chancery, 480,) it appeared that J. B. Irwin and Elizabeth Bevan, a few hours before their marriage, executed articles to the effect, that by a settlement to be made after marriage, Elizabeth's property should be conveyed upon certain trusts for her benefit, and that the settlement should contain a covenant that all property, to which the said J. B. Irwin or the said Elizabeth might thereafter become entitled, should be settled upon the same trusts. Neither party had any property at that time, although Elizabeth had some expectations; and the husband was largely indebted. In less than six months after the marriage, the husband took the benefit of the insolvent act; his schedule showing debts exceeding 4000*l*. and no assets. His "estate and effects, present and future," were thereupon vested in an official assignee. About two years afterwards, his brother died in India intestate; leaving J. B. Irwin heir to certain estates, which were soon afterwards conveyed by him upon the trusts of the settlement. The official assignee having claimed the property, a bill was filed against him, by Mrs. Irwin and the trustee under the settlement, to establish the settlement and to compel him to convey. Lord Langdale, Master of the Rolls, granted a decree. He denied the force of the defendant's argument that this covenant was so extravagant and contrary to public policy, that it was necessarily fraudulent; and he remarked that there was no allegation or evidence that the wife, who married on the faith of it, participated in any fraud. She

appear to have established the rule that the settlement will be supported, unless the marriage was merely a color for effecting a contrivance to defraud the husband's creditors, in which the wife participated. Her knowledge at the time when it was made, that he was in embarrassed circumstances, will not suffice to defeat it.(g)

§ 697. With respect to the persons who are entitled to be treated as purchasers for value in this class of cases, it is well settled that the husband or wife, as the case may be, (or both when the settlement was made by a third person), and the issue of the marriage, are within the scope of the consideration. But collateral relatives, to whom the estate is contingently limited by the marriage settlement, are in general regarded as volunteers. However, the latter proposition is subject to some exceptions, most of which are rather apparent than real; being in truth corollaries from the principal proposition. As, for instance, where a limitation to collateral relatives, is interposed between limitations to different classes of the issue of the marriage; for then the ultimate remainder to the issue of the marriage, can be supported only by regarding the intermediate estate, as having been created for a valuable consideration. There are also some instances, where collateral relatives have been protected, under circumstances which render it difficult strictly to reconcile the ruling with the doctrine that they are regarded as volunteers; and it has even been said that covenants in favor

had a right to insist upon these terms; and it could not be held that a person cannot enter into a binding contract because he is insolvent. And in *Ex parte McBurnie*, 1 De Gex, Macnaghten and Gordon, 441, A. D. 1852, (S. C., 16 Jurist, 807; 21 Law Journal, N. S., Bankruptcy, 15,) the same general principle was recognized, although both the Lords Justices (Knight Bruce and Lord Cranworth) intimated that they would have ruled otherwise if it had appeared that the settlement was extravagant, and grossly out of proportion to the station and circumstances of the husband.

(g) *Colombine v. Penhall*, 1 Smale and Giffard, 228, A. D. 1853; *Fraser v. Thompson*, 1 Giffard, 49, and 5 Jurist, N. S., 669, A. D. 1859; *Bulmer v. Hunter*, Law Reports, 8 Equity, 46, A. D. 1869.

of strangers may be supported, as coming within the scope of the consideration. The subject is not entirely free from perplexity, and the authorities are not always in harmony with each other; but its extended discussion would be out of place here. We may remark, however, that the more recent cases manifest a decided tendency to adhere to the doctrine, that where the marriage was the only consideration, it does not extend to collateral relatives, except in special cases. (h)

(h) See Sugden on Vendors, 14th edition, 716 to 718; Sugden's Law of Property, etc., 153 to 158; and Peachey on Marriage Settlements, 56 to 62; where the English authorities are collected. The case of *Smith v. Cherrill*, Law Reports, 4 Equity, 390, and 36 Law Journal, N. S., Chancery, 738, A. D. 1867, (S. C., 15 Weekly Reporter, 919, and 16 Law Times, N. S., 517,) has been decided since those works were issued. It was a suit in equity by a creditor, to compel the trustees appointed by the marriage settlement of the debtor (a lady), to pay the plaintiff's debt. The settlement provided that the income of the trust property should be paid to the settlor for life; and after her death, that the trustees should stand possessed of the property for the benefit of the issue of the marriage, or, in default of issue, of the mother, sister, and two nieces of the settlor. One of the said nieces was described in the instrument as the adopted daughter of the settlor, and it was provided that she should share equally with the children of the marriage. Upon a contingency, (which happened), the husband was to have an annuity of 200*l.*, and the settlor reserved the right to leave him a legacy. The lady died, leaving no issue, and the personalty was exhausted by the husband's annuity and the legacy to him. Vice Chancellor Malins charged the debt upon the realty, expressing regret that he could do nothing for the "adopted child," but holding that she and the other collaterals must be treated as volunteers. The most recent case is *Wollaston v. Tribe*, Law Reports, 9 Equity, 14, decided by Lord Romilly, Master of the Rolls, in November, 1869. This was a bill to set aside certain trusts in a marriage settlement, and for a reconveyance of the settled property. In 1858, the plaintiff, being forty one years of age, married Robert Wollaston; a settlement of her property having been previously made, first on the plaintiff for life, without power of anticipation; then on Robert Wollaston for life; then on the children of the marriage and of any future marriage of the plaintiff; and, if she had no children, then on her nephews and nieces. The husband died without issue in 1865, and the plaintiff, not having remarried, filed her bill in 1868, setting forth various circumstances, tending to show that she did not understand the effect of the settlement, in the event of her surviving her husband and having no issue. Lord Romilly granted a decree, saying "that the only part of the settlement,

§ 698. It will be seen, from this brief summary, that there is no necessity of resorting to any other consideration than the marriage itself, to sustain any agreement made in contemplation of marriage, or to determine the description of promises which the statute designates. In truth the high value placed by the courts upon the marriage consideration, has led to great reluctance in enforcing a statutory provision which avoids all verbal contracts founded upon it; and this reluctance is the source of nearly all the perplexity which has arisen in the cases under this part of the statute of frauds. And the course of adjudication, under the second and third clauses of the fourth section presents this noteworthy contrast; that in cases under the second clause, there has been a constant struggle to find something in the consideration, to withdraw the promise from the express words of the statute; whereas in cases under the third clause, the struggle has been to find something outside of the consideration to accomplish the same object.

ARTICLE III.

What contracts are within this provision, and vice versa.

- (1) *General principles regulating the application of the statute to agreements made in contemplation of marriage.*

§ 699. The distinction, which we have mentioned, between contracts made in consideration of marriage, and contracts made in consideration of promises of marriage, is nowhere more clearly manifested, than in the ruling that

which is now subsisting, is purely voluntary and not within the consideration of marriage." See also Story's Equity Jurisprudence, 8th edition, §§ 986, 987; *Merritt v. Scott*, 6 Georgia, 563; *Lafitte v. Lawton*, 25 Georgia, 305; *Gorin v. Gordon*, 38 Mississippi, 205; *Bleeker v. Bingham*, 3 Paige (N. Y.), 246; *King v. Whitely*, 10 Paige, 465; *Eaton v. Tillinghast*, 4 Rhode Island, 276. In *Loxley v. Heath*, 1 De Gex, Fisher and Jones, 489, Lord Campbell explained *Hammersley v. De Biel* (post § 744 et seq.) as holding, upon one of the points presented, that an antenuptial contract could not be varied, after marriage, to the prejudice of the children of the marriage. It would seem that this doctrine goes to the extent of protecting such children, before their birth.

the statute of frauds does not prevent an action at law from being maintained, to recover damages for the breach of a verbal promise to marry the plaintiff. This was one of the earliest questions which arose under the act; and it was contended, with considerable plausibility, that, where there were mutual promises to marry, inasmuch as each of them formed the consideration of the other, both were agreements "in consideration of marriage." Indeed, this doctrine received at first the sanction of the courts. In *Philpot v. Wallet*, Freeman, 541, and 3 Levinz, 65, A. D. 1682, the Court of Common Pleas, after two arguments, (a) gave judgment for the defendant, in an action upon a promise to marry, which was found by a special verdict to have been made, without writing, after June 24, 1677. Wyndham, J., thought that the verbal promise was good, "because this promise is for the marriage itself, and not made in consideration of marriage for some collateral matter. But," the report proceeds, "the other three judges were against him, that it was within the words, the meaning and mischief of the statute, and as much a catching promise as any other that the act intended to prevent."

§ 700. Notwithstanding the weight of authority which this case was entitled to command, it seems to have been afterwards silently disregarded, at least in the King's Bench; for in one of many reports of *Harrison v. Cage*, decided in that court A. D. 1698, (b) where the question was whether a woman is liable to an action for a breach of promise of marriage, it is stated that upon the trial, Chief Baron Ward ruled that the action could be maintained without writing; and counsel said, during the argument, that Chief Justice Holt had frequently ruled that the statute intended only agreements to pay marriage portions, which the latter, (who was then on the bench,) did not deny.

(a) The first argument is reported in Skinner, 24.

(b) 1 Lord Raymond, 386. The other reports of the same case do not mention this point. Lord Holt, 456; Carthew, 467; 1 Salkeld, 24; 5 Modern, 411; 12 Modern, 214.

And *Philpot v. Wallet* is regarded as having been definitively overruled, in the court where it was decided, by *Cork v. Baker*, 1 Strange, 34, A. D. 1716. There the plaintiff brought an action in assumpsit in the Common Pleas, setting forth in her declaration the usual allegations, showing a breach of a promise to marry her; and upon non assumpsit pleaded, she had a verdict. Whereupon the defendant moved, in arrest of judgment, "that this parol promise is not good in law." The motion was denied; the report giving no statement of the reasoning of the court, but only that, "after argument, it was held that this is not within the statute of frauds and perjuries, which relates only to contracts in consideration of marriage," and that *Philpot v. Wallet* has been "contradicted by later resolutions."

§ 701. Although the declaration in this case did not show that the promise was verbal, the doctrine that an action will lie for breach of a verbal promise of marriage (unless, by its terms, it is not to be performed within the year), has been since generally acquiesced in, and is now definitively settled.(c) And the express exceptions of such promises from the operation of this provision, which are to be found in many of the American re-enactments of the fourth section, are merely indications of superfluous caution.(d)

§ 702. But the ruling attributed to Chief Justice Holt, in *Harrison v. Cage*, that this clause of the statute is confined to agreements to pay marriage portions, is not

(c) Bacon's Abridgment, title "Agreement," ch. 3; per Bland, Chancellor, in *Ogden v. Ogden*, 1 Bland (Maryland), 287; *Clark v. Pendleton*, 20 Connecticut, 495; per Lord Hardwicke, Chancellor, in *Atkins v. Farr*, 2 Cases in Equity Abridged, 248; *Derby v. Phelps*, 2 New Hampshire, 515.

(d) The same ruling has been made under the provisions of article 2306 of the Civil Code of Louisiana (ante, page 46), in *Morgan v. Yarbrough*, 5 Louisiana Annual Reports, 316, A. D. 1850, where Slidell, J., in pronouncing judgment, said that verbal promises of marriage were sufficient by the Roman law. He added, that the same rule now prevails in France, although, in some parts of that country, there was formerly a statute requiring them to be in writing.

strictly correct.(e) It embraces all agreements between the future husband and wife, or between either of them and any other person, the consideration of which was the completion of the contemplated marriage; whereby any rights will be acquired, or any liabilities created, after the marriage, except such as legally flow from the matrimonial relation.

§ 703. Thus in a New York chancery case, *In the matter of Willoughby*, 11 Paige, 257, A. D. 1844, a petition was presented by the wife of a lunatic, to amend an order of reference directing an inquiry as to the sum proper to be allowed to the wife as the committee of the lunatic's person, for his and her support, so as to include an allowance for the petitioner's daughter by a former husband; on the ground that by a verbal antenuptial agreement, the lunatic had agreed that the daughter, who was twenty one years of age, should reside in his family and be supported by him. The application was denied by the Chancellor, partly upon the ground that the evidence was not sufficient to establish the antenuptial agreement; but also because "the statute is imperative that every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry, shall be void, if not in writing, and subscribed by the party to be charged therewith." He added: "No claim for the support of the step-daughter can therefore be founded upon the supposed agreement stated in the petition; and the lunatic is not bound to support her in any way." He therefore considered the application as addressed to the discretion of the court; which, he concluded, ought not to be exercised so as to grant the prayer of the petition, having regard to the amount of the property, the claims of other persons, the

(e) In *Jorden v. Money*, 5 House of Lords Cases, 185, counsel, arguendo, referred to Holt's supposed ruling; whereupon, Lord Chancellor Cranworth answered (p. 207): "That cannot be true. It cannot be to pay marriage portions: it may be to enter into marriage settlements.

supposed wishes of the lunatic, if he had been in his right mind, and all the other circumstances of the case. (f)

§ 704. But it is evident that the statute will not avoid an oral agreement, merely because a contemplated marriage constituted the *inducement to its execution*, provided its obligatory character did not depend upon the subsequent completion of the marriage. Thus in *Jorden v. Money*, 5 House of Lords Cases, 185, A. D. 1854, (g) the plaintiff founded his title to relief, partly upon an alleged verbal agreement between the plaintiff's father and the female defendant, made in contemplation of the expected marriage of the plaintiff to a young lady not a party to the agreement; and with a view to aid in the provision to be made for the young couple. The terms of the agreement were, substantially, that the defendant would never enforce a bond and warrant of attorney, which she held against the plaintiff; but would and did abandon the debt; and in consideration thereof, the plaintiff's father would desist from his expressed intention to settle upon the plaintiff, as a marriage portion, certain real property, of which he had formerly made a gift to the defendant; so that the latter should continue in the possession and en-

(f) In *Hair v. Hair*, 10 Richardson's Equity (South Carolina), 163, A. D. 1858, the plaintiff filed a bill against her husband for alimony, alleging, as one ground for relief, that as a precedent condition to the marriage, he had promised that he would never remove the plaintiff from the State, or the vicinity of her relatives and friends, without her consent; that in violation of that agreement, he had attempted to compel her to remove with him to Louisiana; and on her refusing to do so, he had abandoned her, and removed thither with his slaves, etc. The court below held, that although this agreement was not in itself a basis for relief, it might be resorted to as an aggravation of the defendant's conduct in other particulars, and granted a decree for alimony. But this was reversed by the Court of Appeals. No reference was made in the appellate court, to the effect of the statute of frauds upon the promise, which was adjudged to be void, as an attempt to interpolate into the marriage contract a "condition in abridgment of the husband's lawful authority over her person, or his claim to her obedience.

(g) S. C., 23 Law Journal, N. S., Chancery, 865; it is cited again upon the other point, post §§ 752-754.

joyment of the property, without molestation. Lord Cranworth, speaking of this agreement, said: "And I may say in passing, that it appears to me that the allusion which was made in the course of the argument to the statute of frauds in such a case is wholly inapplicable; it would not apply at all. The contract sought to be enforced against Mrs. Jorden, would be a contract not to sue upon a certain bond, that is not within the statute of frauds. If there was a valid consideration for that contract, unquestionably she was bound to perform it." Lord St. Leonards expressly, and Lord Brougham impliedly, assented to this ruling upon the law of the case; but it was held by two of their lordships against the opinion of the third, that the evidence was not sufficient to prove the making of the agreement.

§ 705. One of the questions presented in the very complicated case of *Andrews v. Jones*, 10 Alabama, 400, A. D. 1846, was disposed of upon substantially the same principle. There it appeared that before the marriage of the defendant Walker, to the daughter and only child of Mrs. Jones, another defendant, the daughter's share of the personal property of her deceased father had been lost by injudicious, and apparently unauthorized investments, made by her mother, who was her guardian; and that the latter had no part of the property in her possession, except six slaves, which she continued to retain, although the daughter had reached her majority. The mother had kept no account of the daughter's expenses, and it was said that if the losses and expenses should be allowed to her, she would owe her daughter little or nothing. It was thereupon agreed between Mrs. Jones, her daughter, and the defendant Walker, "previous to the marriage of the two latter, and in consideration thereof," that the daughter and her intended husband would never call the mother to an account; "that the six slaves should be conveyed to her; and that she should hold them and the estate of her daughter in absolute right." After the marriage, the defendant Walker made a bill of sale of

the slaves to Mrs. Jones, who had continued to retain the possession. About five years afterwards, the complainants recovered a judgment against Walker; and an execution having been returned unsatisfied, they filed this bill to reach the slaves and other estate of his wife, insisting that they were entitled to an accounting from Mrs. Jones. The court below made a decree dismissing the bill, which was affirmed upon error. Collier, C. J., delivering the opinion of the Supreme Court, said that the statute of frauds could not impair the effect of the transaction between Mrs. Jones, her daughter, and Walker; because, if it was a contract, it was executed at the time when it was made; except perhaps as to the six slaves, and as to them it was subsequently executed. And he also said that inasmuch as the mother-in-law was not in actual possession of any of her daughter's property, except the slaves, it was immaterial whether the legal proposition insisted on by the plaintiffs, that the possession of a guardian is in law the possession of the ward, even after the latter has attained majority, was sound or otherwise; because the daughter and her intended husband relinquished the entire estate to Mrs. Jones. This disclaimer of title and interest, if it did not operate as a release, prevented her possession of any part of the estate from being transferred by construction of law to the daughter, or after the marriage to Walker. Consequently the wife's equitable interest had never been reduced to possession by the husband; and in this case her equity was superior to that of the plaintiffs.

§ 706. It seems also that the mere fact that an agreement was to be fulfilled, upon the happening of the marriage of one of the parties, will not bring it within the statute, if it was founded upon a distinct consideration unconnected therewith. Although made in contemplation of marriage, such an agreement is not one made upon consideration of marriage. Thus in *Peter v. Compton*, Skinner, 353, and Lord Holt, 326, A. D. 1693, (h) the question was whether

(h) S. C., Comberbach, 463.

an action would lie upon a verbal undertaking, which is stated to have been "an agreement in which the defendant promised, for one guinea, to give the plaintiff so many at the day of his marriage;" and it was held that it was not within the statute. However the brief reports of the case indicate that the only point taken and discussed, was whether the promise was within the fifth clause of this section, "for," the reports say, "the marriage did not happen within a year."

§ 707. For obvious reasons, most of the litigation which has arisen upon agreements made in consideration of marriage, has been of an equitable character; and hence the application of the statute to such agreements has been settled almost exclusively by the determination of courts of equity. It will be most convenient to consider many of the cases, in connection with the principles regulating the administration of relief in that great branch of equity jurisprudence, the specific performance of contracts; the questions arising under the statute having been generally presented, either by a suit brought for the specific performance of some verbal agreement, which was apparently within its terms; or by an answer interposed to a bill for equitable relief, wherein the defendant insisted upon the right to such a performance, as a defence to the plaintiff's claim. The next chapter will be exclusively devoted to that subject, and the reader will find there many cases illustrating the description of agreements, which the language of the statute embraces. The cases which follow, although most of them involve questions of that description, chiefly turned upon the form and character of the agreement; the principal point at issue being whether these were such, as to render the statute applicable in the first instance.

(2) *Cases where the agreement was founded upon some distinct consideration, in addition to that of marriage.*

§ 708. Questions of considerable nicety sometimes arise, when a party founds his title to equitable relief, upon an

antenuptial agreement, the consideration of which was not only the future marriage, but also some distinct act in addition thereto, which has been performed by him, or by the person from whom he derives his right of action. It is quite clear that if the additional consideration was of such a character, that its performance would entitle the party to the relief which he seeks, if the marriage consideration had not been made a part of the contract, the statute will interpose no obstacle to his obtaining a decree. In such a case, the right to relief results from the fact, that the statute does not make agreements in consideration of marriage illegal, but only prevents their enforcement; (i) hence the party is at liberty, for the purpose of taking the case out of the statute, to pass over that part of the consideration which consisted of the marriage, and rely upon the performance of the additional consideration. But it often happens that the distinct consideration was so intimately connected with, and dependent upon the marriage consideration, that the two are incapable of any separation which will enable the former to stand without the aid of the latter. The principle which governs such cases is quite obscure, and has never been clearly defined in the books. Indeed we doubt whether the cases admit of any distinction between the two considerations; for those which appear to have been well decided rested upon a distinct act of performance of the entire agreement, which applied quite as pointedly to the marriage consideration, as to the supposed additional consideration; and it is well settled that such performance will take the case out of the statute, without reference to the question whether there were two separate considerations.

§ 709. The doctrine, that a distinct act of performance will take an antenuptial agreement out of the statute, was recognized, but without specifying the characteristic feat-

(i) The principle is the same if there was no distinct consideration for the antenuptial agreement, but such a consideration was furnished after the marriage. Sugden on Vendors, 14th edition, p. 718.

ures of the act which will suffice for that purpose, in a dictum of Lord Macclesfield, given in one of the reports of *Lady Montacute v. Maxwell*, the leading case under this provision of the statute; (j) but it was more clearly expounded in another case of almost equal celebrity, but of comparatively recent date, *Hammersley v. De Biel*, 12 Clark and Finnelly, 45, A. D. 1845. (k) A summary of each of these cases will be given in the following chapter; where, however, *Hammersley v. De Biel* is cited, rather in connection with certain observations of the judges, which were not strictly necessary to the decision, than so as fully to show the grounds of the judgment upon the merits. Indeed it must be acknowledged that the latter undertaking would be one of some difficulty; inasmuch as the English courts and elementary writers have not yet ceased to dispute, touching what was really decided in that now noted case. But it is generally conceded, that the judgment established one proposition directly in point upon the present subject of inquiry; namely, that the execution of the instrument by the plaintiff's father and uncle, by which a jointure of 500*l.* per annum was secured to the intended wife upon the family estate in Mecklenburg, was a distinct act of performance of the proposals contained in the memorandum, in addition to the marriage; which entitled the plaintiff to insist upon performance of so much of the proposals, as the testator had not performed during his life time. This appears to be the result of the opinions delivered, conceding that the proposals contained in the memorandum constituted a contract within the meaning of this clause of the statute; and without regard to the question, whether there was a sufficient signature to the memorandum, either directly or through the medium of the testator's subsequent letter, to satisfy the requirements of the subsequent portion of the fourth section. And it will be noticed, not only that this settlement was of no effect, without the subsequent completion of the

(j) *Precedents in Chancery*, 526. The remark referred to is copied in the note to § 722, post.

(k) See post, §§ 744-747.

marriage; but that the annuity was not to commence till after the termination of the marriage, and only in case the intended wife survived her husband, a contingency which did not in fact occur.

§ 710. In *Satterthwaite v. Emley*, 3 Green's Chancery (New Jersey), 489, A. D. 1845, Chancellor Haines expressed the opinion that a distinct act of performance by the wife, after the marriage, on the faith of the antenuptial verbal promise, would enable her to sustain, as a purchaser, the husband's performance of the same agreement in her favor, even against his creditors; provided she could establish the antenuptial promise by sufficient evidence. The bill was filed by the trustee of the wife against the husband and his judgment creditors. It alleged that the husband and wife made an antenuptial agreement, to convey the wife's real and personal property, upon certain trusts for her benefit; that after the marriage, they conveyed the real estate to the husband's son by a former marriage, who immediately reconveyed it to his father; this being a temporary arrangement, pending the selection of a trustee, made in consequence of the husband's representations to his wife, that he would otherwise derive no benefit from her property in case of her death; and that afterwards they united in a deed of trust to the complainant, in conformity with the antenuptial agreement and reciting the same; but that meanwhile the lien of the judgment attached, &c. The Chancellor decreed that the trust deed should stand, as against the husband and all claiming under him, but not against the creditors; dismissing the bill as to the latter, on the ground that the evidence, (which consisted of the recitals in the deed and the husband's postnuptial declarations), were not sufficient to establish the antenuptial agreement as against them. But he said that if the evidence had been sufficient, he would have inclined to give validity to the settlement, because "such settlement could not be considered voluntary, but upon a good and valuable consideration, to wit, the marriage, and the conveyance of all the wife's estate."

§ 711. And in *Dygart v. Remerschnider*, 32 New York, 629, A. D. 1865, the New York Court of Appeals marked out very clearly and satisfactorily, the distinction between a verbal agreement in consideration of marriage only, and one where there was an additional consideration, performance of which would of itself entitle the party to relief, and which was connected with the marriage only because its performance depended upon the accomplishment of the latter. This was an action brought against George Remerschnider and his wife Catharine, by a judgment creditor of George, to set aside a conveyance of real estate, made by him to his wife, through an intermediate grantee: It appeared that in 1854, George and Catharine intermarried; having previously made an oral agreement, by the terms of which the parties were to intermarry, and Catharine was to pay the debts which George then owed, and he was to convey to her the premises in question. The amount of his debts was about equal to the value of the property; and after the marriage, she paid them in full; first applying thereto certain moneys which she owned at the time of her marriage, and afterwards, from time to time, other moneys, which she earned by working at her trade, with the assent of her husband.(7) The latter frequently promised to convey the property to her; but neglected to do so till 1861, after the commencement of the action, in which the plaintiff recovered his judgment. The debt to the plaintiff was contracted in 1860; and, as it is to be inferred from a statement in one of the opinions, after Catharine had paid all her husband's debts, existing at the time of the marriage. The complaint was dismissed at special term; and the plaintiff appealed to the general term, where the judgment was reversed, and a new trial ordered. The defendants then appealed to the Court of

(7) According to the married woman's acts, then in force in New York, the moneys which she owned at the time of her marriage, were Catharine's separate property; but her earnings after marriage belonged to her husband. It was also provided that all contracts made between persons in contemplation of marriage, should remain in force, after the marriage had taken place.

Appeals, where the last mentioned order was reversed, and the original judgment affirmed. The decision of the Court of Appeals, as far as this question was involved, was put upon the ground, that there was a consideration for the contract, entirely independent of the marriage, performance of which, by the wife, was sufficient of itself to entitle her to relief; so that the husband had really done only what he might have been compelled to do, by a court of equity, upon her application. (*m*)

(*m*) Three opinions in favor of a reversal were delivered in the Court of Appeals. Davis, J., said that the real question was whether Catharine, after paying her husband's debts, had any rights which a court of equity would recognize. That she had none, based solely upon the consideration of marriage, because the statute of frauds avoids an oral agreement founded upon that consideration; so that the conveyance could not be sustained, against the plaintiff, as the consummation of an agreement based upon an executed promise of marriage. But the agreement had another consideration, sufficient to uphold it, after its execution without any fraudulent intent, namely, Catharine's promise to pay her husband's debts, and her actual payment of them. The force of this contract was preserved, notwithstanding the marriage, by the married woman's acts. She performed it, partly with means, to which she had exclusive title, and partly with means, which were in substance the gift of her husband to her, namely her own earnings. He had a right to give these to her, as against a creditor whose debt was contracted long afterwards. And he would have had no right to deny that she had fully performed her agreement, on the ground that he had given her the money with which she did so. She was therefore entitled to a conveyance before the plaintiff's debt was contracted; and he had done only what he was bound to do, by making the conveyance to her. Her equity was prior to the plaintiff's; and it ripened into a title, before the plaintiff acquired a lien. Wright, J., said that even if the conveyance was voluntary, the plaintiff, although an existing creditor of the grantor, was not entitled, (under the provisions of the New York statute against fraudulent conveyances), to set it aside, unless it was fraudulent in fact; and there was no finding to the effect that it was made with a fraudulent intent, or any proof of such an intent. But he thought that it was not voluntary. "It did not rest solely, or even principally, upon the consideration of marriage." It was an agreement for the purchase of the real estate; the character of which was not altered by adding, to a money consideration, that of marriage. The learned judge then followed substantially the argument of Judge Davis, respecting the mode of performance by the wife, the effect of the appropriation of her earnings thereto, and her rights against her husband after performance. Potter, J.,

§ 712. But other cases do not permit the dividing line between the two considerations, to be drawn so clearly and and satisfactorily. Such was *Crane v. Gough*, 4 Maryland, 316, A. D. 1853; wherein the Court of Appeals reversed the Chancellor's decision, reported in 3 Maryland Chancery Decisions, 119. This was a bill filed by the administrator of Mary Crane against the executors of George Crane, setting forth that the plaintiff's intestate and the defendants' testator intermarried; that the husband survived the wife; that at the time of the marriage, Mrs. Crane was the owner and possessor of certain notes and bonds; that her husband did not during his life time reduce them to possession; that they were payable to Mrs. Crane by her antenuptial name, and had never been indorsed or assigned by her; and that they were in the possession of the defendants. (n) The plaintiff thereupon prayed a decree, that they be delivered up to him for distribution, etc. The defendants interposed as a defence, an antenuptial contract between Mrs. Crane and her husband; whereby, in consideration of the marriage, then about to take place between them, she gave him the notes and bonds, to become his property when the marriage should take place. The evidence tended to prove a delivery of the bonds to Col. Crane, and an agreement by him to allow to his intended wife the interest thereon, as pin money; and the appellate court thought that the delivery, as well as the agreement, was antenuptial. But there was no proof of any postnuptial performance of the

concurrent, upon both points, in an opinion of considerable length. He also said that it was not necessary to resort to the married woman's act, in order to sustain the contract after marriage, as equity would have enforced it if that statute was not in existence, Catharine having not only fully performed it, but also taken possession of the property under it. It was therefore equitably her property, for several years before she procured the legal title; and equity would make the conveyance relate back to the time when it should have been given.

(n) By a Maryland statute, if a husband fails to reduce to possession his wife's choses in action, during their joint lives, or after her death, (if he shall survive her,) they devolve upon her representatives at his death.

husband's agreement to allow his wife the interest. The Chancellor granted a decree; but the Court of Appeals reversed it and dismissed the bill. The latter decision was very distinctly put upon the ground that the contract was executed by Mrs. Crane, before the marriage, by placing the bonds in the hands of her future husband. This, the court thought, would have entitled her to maintain a bill against her husband for the payment of the interest; and a fortiori, would entitle the defendants to sustain their possession of the subject matter of the contract, after it had been executed.(o)

§ 713. In this case it seems to be impossible to separate the two *considerations*; but the decision may probably

(o) The following extract from the opinion of Le Grand, C. J., states the substance of the decision, as far as it involved the question now under examination: "The declarations of Mrs. Crane, prior to her marriage, went to the extent of showing that she *had given up her notes and bonds* to Col. Crane; and those made to Dr. Jones, shortly after the marriage, in the presence of her husband, amount to an acknowledgment of its fulfilment. Now although marriage is not per se a part performance, sufficient to take a case out of the statute, it is nevertheless a sufficient consideration for the contract, and one which courts regard with especial favor, as of most meritorious character. The declarations of Mrs. Crane, prior to the marriage, indicate with sufficient clearness its terms; and those immediately after its solemnization, are, in our judgment, equivalent to an acknowledgment of its execution on her part; and we are therefore warranted in the conclusion, that the possession of Col. Crane was obtained under the contract, and not in virtue of his rights as husband. If the bonds, etc., were in possession of Col. Crane jure mariti, she need not have said any thing on the subject; the law passed the title and right of possession. But in these conversations, she speaks of her having given the bonds, etc., and must be considered as referring to what was done under the agreement, and it is evident she was so understood by those to whom she addressed herself. Had she proceeded against Col. Crane, and had he acknowledge he received the securities under the contract now relied upon by the defendants, a court of equity would have decreed in favor of the wife. On the whole we think the evidence sufficient to show such an execution of the contract, as to withdraw the case from the operation of the statute of frauds." The decision in this case was also partly put upon the ground, that the statute did not apply to a *defence*, founded upon a parol agreement, which could not have been enforced by action.

be upheld, (apart from the ground that the husband's executors were acting merely on the defensive,) because there was a distinct act of *performance* of the agreement, in addition to the marriage; the notes and bonds having been delivered over by the intended wife. But the case next to be cited appears to be open to considerable criticism, with respect to the effect given by the court to the act of performance; as well as the attempt to distinguish between the marriage consideration, and that which was resorted to to uphold the transaction.

§ 714. This was *Riley v. Riley*, 25 Connecticut, 154, A. D. 1856, where an appeal was taken from the decision of the commissioners upon the estate of a deceased person, allowing a claim against the estate; and after a trial in the appellate court, the questions of law were reserved for the opinion of the Supreme Court of Errors. The claimant was the widow of the deceased; and the testimony showed that, about seven years before the marriage, she loaned to the deceased three hundred and twenty dollars, taking therefor his notes payable upon demand, no marriage being then contemplated between them; but shortly before their marriage, and in contemplation thereof, she "spoke to the deceased about the payment of the notes: he replied that it would be inconvenient for him to pay them then; that they would be good against his estate. She told him that she did not want to be left in the hands of his relatives, and he replied that she should not be." It was further proved that he told her, both before and after the marriage, "to keep the notes, and they would be good against his estate;" that she kept them during the coverture; and that he repeatedly said to her relatives that he owed her the money, and if he did not pay the notes in his life time, they would be paid out of his estate. The notes were read in evidence, but the remainder of the evidence was oral, and the administrator objected to its reception. After argument, the Supreme Court determined that the oral evidence was admissible, and the

court below was accordingly advised to render judgment for the appellee. (*p*)

(*p*) The opinion was delivered by Ellsworth, J., who first stated that if the widow's claim could be upheld, upon either legal or equitable principles, the appeal could not be sustained under the statute regulating the proceedings; that the parties, being aware that the notes would be extinguished by the marriage, undertook to guard against that result by the promise of the deceased, that if the claimant would forbear to insist upon payment before marriage, the notes should not be extinguished; but should remain good and collectible out of his estate, and survive to the petitioner like any other of her choses in action which he should forbear to collect during the coverture; and that they should continue to be her separate estate. This interpretation of the language, said the learned judge, is not free from all question; but it appears to be only just and reasonable, when it is considered that the parties intended that the notes should remain in force after the marriage, which could be done only by a new promise, founded upon forbearance. It appears, he continued, that Riley undertook that these notes should not fall into his estate, but should remain and survive to the petitioner, like any other choses in action which he should forbear to collect during the coverture; and that they should continue to be her separate estate. If this is the true construction, it could be enforced at law, for it was a promise to be performed after the coverture had ceased. The learned judge then proceeded: "As to the objection derived from the statute of frauds and perjuries, we think there is no ground for it. The antenuptial promise was made in consideration of forbearance, and not in consideration of marriage, though it was made in contemplation of marriage; which is not inconsistent with the claim of the appellant's counsel, that a promise in consideration of marriage must be in writing. Marriage was not the meritorious cause of Riley's promise; the marriage obligation was already perfect; and the promise in question was made upon the assumption that it was so, and for the exact purpose of saving the notes from the effect of the marriage, when the marriage contract should be executed. No advancement or benefit was to accrue to either party in the event of the marriage, any more than if it did not take place; and hence it is not possible to consider marriage as the consideration of the promise. It was the debt; the forbearance of it; and this forbearance having been extended upon the request of Riley, and continued until his death, there is no reason why his estate should not be liable." The learned judge said that this was all which it was necessary to decide, in order to dispose of the case; but he proceeded to consider some other points. He thought that the claim might also be sustained on the ground, that in equity the transaction was in effect the same, as if the husband had promised that the note of a stranger, owned by her at the time of the marriage, should be kept as her separate property, and survive to her; and in that aspect of it, these notes were her separate estate, which he held as her trustee; or the transaction might be regarded as a postnuptial gift, to which no one but creditors could object.

§ 715. The court appears to have assumed, in this case, that because Riley had already promised to marry the petitioner, the agreement could not have been made in consideration of marriage; which is equivalent to saying that an antenuptial contract is one made in consideration of a promise of marriage; a proposition of which we have endeavored to show the fallacy, in the foregoing pages. And upon the point that there was any thing distinct from the marriage, either as a consideration or as an act of performance, the case is unsatisfactory, and, we think, of dangerous tendency. It is quite clear that the agreement for forbearance was, in legal effect, only a promise, on the part of the woman, to leave her antematrimonial rights in abeyance, awaiting the accomplishment of the marriage; and that she never parted with her right to enforce the notes, as a consideration for the promise on the part of the husband; their extinguishment having resulted, not from the forbearance, but from the subsequent marriage. There was, therefore, no legal consideration for her promise to forbear, or for her actual forbearance; and nothing beyond the marriage furnished by either party, except a voluntary forbearance on one side, and a void promise on the other. Upon the hypothesis, which the court adopted, it would seem clear, that if the match had been broken off by the petitioner, she could not have collected the notes; for if the agreement bound her, a plea of the agreement and *semper paratus* would have afforded a perfect defence to an action in her favor.

§ 716. Again, in order to entitle a party to a decree for the performance of an agreement within the statute, he must have *done some specific act*, in pursuance of the contract. Mere acquiescence in the previously existing condition of the subject matter of the alleged agreement will not suffice; because it does not necessarily imply that any new agreement had been made. (q) This princi-

(q) Thus where a tenant alleges that he made a verbal contract with his landlord for a new term, or for the purchase of the property, his merely remaining in possession is not an act of performance on his part; nor is the

ple was completely disregarded by the ruling adopted in *Riley v. Riley*, and its soundness is manifested by the consequences to which that ruling will lead. For if a verbal request on one side, and a verbal assent on the other, followed by no visible act, is to set the statute aside, it is quite clear that but little will be left of the provision that agreements in consideration of marriage must be in writing. Thus a woman's forbearance, at the request of her intended husband, to put her property in the hands of trustees, would sustain his verbal promise that she should enjoy and dispose of it after marriage, as a feme sole. The list of such cases might be almost indefinitely extended. (r)

§ 717. The case of *Finch v. Finch*, 10 Ohio, New Series, 501, A. D. 1860, is a direct ruling against the doctrine of *Riley v. Riley*. There, the widow of Ira Finch, deceased, filed a petition for admeasurement of dower against his devisees; to which they interposed an answer, setting forth three defences, the second being a verbal agreement between the petitioner and the deceased, in contemplation of their marriage, to the effect that she should retain and absolutely control the property which she owned, consisting of personal property and a dower estate in the lands of a former husband, and that upon her decease her property should all go to her children by her former husband; and on the other hand, that if she survived him, she would relinquish all title and interest to his estate, real and personal, to his legatees and devisees, and would make no claim thereon. It was further alleged that the agreement had been executed, by the retention, enjoyment, and disposition of her property by the petitioner, during the marriage. A motion having been made in the court below, to strike this answer from the

landlord's acquiescence in his continued possession an act of performance on the part of the latter. Sugden on Vendors, 14th edition, chapter iv, sec. vii, p. 152; 1 Story's Equity Jurisprudence, 8th edition, §§ 762, 763; Browne on Frauds, § 477; and numerous cases cited by each author.

(r) Several of the cases cited in the next chapter are directly in point against this ruling, particularly *Caton v. Caton*, post §§ 756-758.

files, on the ground that the agreements therein set forth were within the statute of frauds, the case was reserved for the decision of the Supreme Court, where it was determined that the answer was insufficient in all its branches. Upon the question whether the second defence was sufficient, Brinkerhoff, C. J., said: "The antenuptial agreement, set forth in the second defence alleged in the answer, was clearly an agreement 'upon consideration of marriage.' It is true, marriage was not the sole consideration for the agreement, on the part of the intended wife, that she would not demand dower, in case she survived her intended husband; his agreement not to exercise the rights, in respect to her property, which the marriage would confer, constituted an additional consideration for the agreement on her part; but the agreement was entire; the intended marriage entered into and formed part of the entire consideration on both sides; and without it the agreement never would have been made."(*s*)

§ 718. It is difficult, and perhaps impossible, to lay down any rule, which will furnish a correct test for every case of this description. But it would seem clear upon principle, that when a party insists upon the right to take a case out of the statute, on the ground that there was a distinct consideration for the verbal promise, in addition to the marriage, the additional consideration must have been of such a character, that it gave the other party to the contract, or some person within the scope of the consideration, some legally enforceable right, which he would not otherwise have enjoyed. If it answers this description, the principle is the same, whether the right was to be enjoyed before the marriage, during its existence, or only after its termination; or even, in the latter event, only in case the person for whose benefit it was created, should survive till the marriage was terminated.(*t*)

(*s*) The question whether there had been such a performance of the antenuptial agreement, as would take it out of the statute also arose in this case; which is cited again, in that connection in the following chapter.

(*t*) See *Houghton v. Houghton*, 14 Indiana, 505, and another citation of *Finch v. Finch*, post §§ 737, 738.

CHAPTER TWENTIETH.

PEOULIAR EFFECT, UPON THE AGREEMENTS WHICH FALL
WITHIN THIS PROVISION, OF THE EQUITABLE DOCTRINES,
WHEREBY RELIEF IS GRANTED TO A PARTY, WHO HAS
PERFORMED HIS PART OF A VERBAL AGREEMENT.

§ 719. In a subsequent part of this work, we shall bestow considerable attention upon the effect, at law and in equity, of partial or complete performance of verbal agreements, falling within the terms of the statute of frauds. In general, the relief granted by the courts, in such cases, is regulated by the same principles, under whatever clause the question is presented ; but in cases arising upon agreements made in consideration of marriage, the application of some of these principles becomes exceptional, and leads to results, directly contrary to those which are attained, in cases arising under the other clauses. For while the statute describes the other verbal promises which it embraces, according to their form or subject matter ; whereby room is left for equity to lay hold of the performance by the party seeking relief, upon the faith of the promise, as a circumstance taking the case without the supposed intent of the legislature ; this clause is so framed that the statute is set in motion, by the very fact, upon which the equity jurisdiction rests. And unless the statute applies to every such case, it applies to none ; for, with respect to questions arising upon the sufficiency of the performance, all the cases are equally meritorious. The consideration is of a character so peculiar, (being, as we have already seen, the highest known to the law, and from its nature rendering a restoration to the status quo impossible), that it always satisfies the conditions affixed to the equitable right to relief. Hence arise sundry perplexing questions, peculiar to this species of contract.

ARTICLE I.

Whether marriage itself is such a performance, as to call into operation the equitable rule.

§ 720. There is some authority for the proposition, that when a marriage has been contracted upon the faith of a verbal promise, equity will not suffer the statute to be interposed to defeat an action by the promisee for specific performance.^(a) But, as we have already remarked, the language of the statute is such, that this proposition is equivalent to denying that courts of equity are subject to its provisions. And the scattered dicta to be found in the books, in support of such a doctrine, cannot prevail in opposition to the express language of the act, and the steady current of decisions, which has long run in the contrary direction.

§ 721. The ruling of Lord Chancellor Macclesfield, in the earliest case of all, has never been successfully questioned upon principle, or overruled by authority. We

(a) Mr. Justice Story, in *Jenkins v. Eldridge*, 3 Story, 181, speaking of the principle that equity would not relieve in such cases, where there was no actual fraud, said: "I doubt the whole foundation of the doctrine, as not distinguishable from other cases, which courts of equity are accustomed to extract from the grasp of the statute of frauds." But the remark was entirely obiter. There is no expression of such an opinion, in the earlier editions of his *Equity Jurisprudence*, but we find in the eighth edition (§ 987, a), a comment, added by Judge Redfield, upon *Warden v. Jones*, cited post § 731, substantially to the same effect. And a similar opinion was expressed, but also obiter, by Chancellor Dargan, in *Hatcher v. Robertson*, 4 Strobhart's Equity (South Carolina), 182, A. D. 1850, and by Chancellor Wardlaw, in *Hair v. Hair*, 10 Richardson's Equity (South Carolina), 165, A. D. 1858. To the same effect were the remarks of Benning, J., in *Durham v. Taylor*, 29 Georgia, 166, A. D. 1859; where he argued that, if a marriage is necessary, in order to bring a case within the statute, antenuptial agreements must be excluded from it; because the consideration of such an agreement is a promise to marry; that the marriage is the performance of the promise, which formed the consideration, and not the consideration itself; and that such performance, upon every principle of equity, entitles the other party to relief, in consequence of the impossibility of restoring him to the status quo. This doctrine is commented upon, ante, §§ 687-689.

refer to *Lady Montacute v. Maxwell*, 1 Peere Williams, 618, decided in the year 1720. There the plaintiff brought a bill against her husband, setting forth that before the marriage, he promised that she should enjoy all her estate to her separate use; that he had agreed to execute writings accordingly, and had instructed counsel to draw them; but when they were about to be married, the writings not being perfected, he "desired this might not delay the match, in regard to his friends being there, it might shame him; but engaged that upon his honor she should have the same advantage of the agreement, as if it were in writing, drawn in form by counsel, and executed;" whereupon the marriage took place; and afterwards, being reminded of his promise, he wrote a letter to her, expressing that he was always willing that she should enjoy her own fortune as if she was sole, and that it should be at her command. To this the defendant pleaded the statute, and averred that he never signed any promise or agreement before marriage, that she should enjoy her estate separately.

§ 722. After argument the Lord Chancellor allowed the plea. He said: "In cases of fraud, equity should relieve, even against the words of the statute; as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in, and executed in lieu of the former; in this or such like cases of fraud, equity would relieve; but where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making these promises void, equity will not interfere; nor were the instructions given to counsel for preparing the writings material, since after they were drawn and engrossed, the parties might refuse to execute them; and as to the letter it consists only of general expressions, as 'that the estate should be at the plaintiff's command, or at her service.' Indeed," continued his Lordship, "had it recited or mentioned the former agreement, and promised the performance thereof, it had been material: but as this case is circumstanced, allow the plea;

also this plea was in bar of a discovery as to all matters, which, if discovered and admitted, might be barred by the statute, so far may the statute be pleaded in bar of such discovery.”(b)

(b) The plaintiff afterwards amended her bill, further charging that the defendant, in order to induce her to marry him, without a settlement, and to secure the performance of his promise to execute it afterwards, promised to take the sacrament on it, and did take the sacrament accordingly; and that he wrote a letter after the marriage, wherein he promised to make such settlement, and that he was ready to sign the writings according to her desire. The defendant answered, that he took the sacrament, only in compliance with the custom of his (the Roman) church, to take the sacrament on marriage; and as to the letter, he did not remember the particulars; but it he had written any thing concerning his readiness to sign any writings, it related to some proposals he had made of settling 1,500*l.* on her, which he soon afterwards did. He then again pleaded the statute. The Lord Chancellor thought the case very much altered by the new circumstances; that at first it stood purely upon the parol promise, upon which there was no color to relieve the plaintiff; but that such a parol promise, was a sufficient consideration to support a postnuptial settlement, or to establish a postnuptial promise in writing; and upon a consideration of the facts, he thought that there was great evidence of a promise in writing after marriage; wherefore the plea was ordered to stand for an answer. 1 Strange, 236. The case is also briefly reported in 1 Equity Cases Abridged, 19, and Precedents in Chancery, 526; but it is impossible to determine with certainty whether either report relates to the case made by the original, or by the amended bill. In the former it is intimated, that the defendant privately countermanded the instructions for drawing the settlement, and that the plaintiff was drawn in to marry him, “by persuasions and assurances of such settlement.” The latter represents Lord Macclesfield’s judgment to have been: “Where the parties come to an agreement, but the same is never reduced into writing, nor any proposal made for that purpose, so that they rely wholly upon their parol agreement, that *unless this be executed in part*, neither party can compel the other to a specific performance, for that the statute of frauds is directly in their way; but if there were any agreement for reducing the same into writing, and that is prevented by the fraud and practice of the other party, that this court will in such case give relief; as where instructions are given, and preparations made for the drawing of a marriage settlement, and before the completing of it, the woman is drawn by the assurances and promises of the man to *perform it, and after to marry him.*” Mr. Roberts, it appears to us, strangely misquotes and misunderstands the last sentence of this remark. Roberts on Frauds, 198; followed in Browne on Frauds, § 444.

§ 723. The doctrine that where the aggrieved party has relied upon the promise only, the court can afford no relief, has been re-asserted and sanctioned by numerous subsequent decisions in England and in the United States. It rests, by common consent, upon the express language of the statute, and the impossibility of otherwise giving any practical effect to the clause in question. As Lord Cottenham remarked in *Lassence v. Tierney*, 1 Macnaghten and Gordon, 571, 572: "A parol contract, followed only by marriage, is not to be carried into effect, marriage being no part performance of the contract. If it were, there would be an end of the statute, which says that a contract in consideration of marriage shall not be binding unless it be in writing; but if marriage be part performance, every parol contract followed by marriage would be binding." (c)

§ 724. And although soon after the passage of the statute it was suggested by Lord North, in two cases arising under another clause of this section, that a distinction was admissible, between a case where the party relied merely upon a promise to do a certain act, and one where it was agreed that a writing should be executed, binding him to do the act, (d) this idea is now abandoned; and it is conceded that in the absence of any trick or fraud, no such distinction can be sustained, under whatever part of the statute the question arises. (e) Where it was agreed that

(c) See also Atherley on Marriage Settlements, 90; Reeve's Domestic Relations, 3d edition, 215; Per Sir John Romilly in *Warden v. Jones*, 23 Beavan, 492; Per Lord Thurlow, in *Redding v. Wilkes*, 3 Brown's Chancery, 400; Per Brinkerhoff, C. J., in *Finch v. Finch*, 10 Ohio, New Series, 506; Per Lord Thurlow in *Dundas v. Dutens*, 1 Vesey, 199.

(d) *Hollis v. Whiteing*, 1 Vernon, 151, A. D. 1682; *Leak v. Morrice*, 2 Cases in Chancery, 135, in the same year.

(e) Beames's Pleas in Equity, 181, 182; Per Lord Thurlow, in *Whitchurch v. Bevis*, 2 Brown's Chancery, 564, 565; *Warden v. Jones*, 2 De Gex and Jones, 76, cited more fully post, § 731; *Wood v. Midgley*, 5 De Gex, Macnaghten and Gordon, 41; *Spurgeon v. Collier*, 1 Eden, 55, post, § 730; *Hackney v. Hackney*, 8 Humphreys (Tennessee), 452, cited in the next section; *Lassence v. Tierney*, 1 Macnaghten and Gordon, 551, post, § 748.

a writing should be executed, but its execution was prevented by an accident; and the party, knowing that it had not been executed, nevertheless married, an action cannot be sustained to enforce the parol agreement. (f) As for instance where a parent or other relative promised to give a portion with an intended wife, and directed that the necessary writings should be prepared; but before they were executed, he died, and the marriage subsequently took place. In such a case, the party is without remedy, even though the agreement contemplated a settlement by him, which he executed after the death of the other party, but before the marriage. (g)

§ 725. There is an American case, which is almost a counterpart of that which came before Lord Macclesfield; we refer to *Hackney v. Hackney*, 8 Humphreys (Tennessee), 452, A. D. 1847. There a wife filed a bill against her husband, for the specific performance of an antenuptial promise to settle upon her certain slaves, of which she was the owner at the time of her marriage; charging that he had no intention of performing the agreement when he made it, and intended a fraud upon her. It appeared that the complainant had urged the defendant, before the marriage took place, to execute a settlement of her property upon her; but he had refused to do so, on the ground "that such a course was in violation of all his preconceived opinions, concerning the anticipated relation of husband and

(f) *Spurgeon v. Collier*, 1 Eden, 55, post, § 730; *Warden v. Jones*, 2 De Gex and Jones, 76, post, § 731. In *Wanchford v. Fotherly*, Freeman's Chancery, 201, A. D. 1694, it is said that Lord Somers cited the case of "*Masquill*, etc., where writings were prepared and agreed, but being blotted, were ordered to be writ fair, and were so; but before they were sealed the party died; and this court charged the executor with the portion agreed to be paid." But this is probably an incorrect statement of the case of *Cookes v. Mascall*, post, § 727.

(g) *Bawdes v. Amhurst*, Precedents in Chancery, 402, A. D. 1715; *Lady Thynne v. Lord Glengall*, 2 House of Lords Cases, 131; S. C., 12 Jurist, 805, A. D. 1848. But the case might be different, if the future husband had executed the settlement before the death of the other party. *Hammersley v. De Biel*, post, §§ 744-747.

wife; that it was calculated to impair the independence of the husband, and to subject them both to the strictures and animadversions of others." But he also repeatedly promised her, that she should control her property, unaffected by his marital rights; and that after the marriage was consummated, he would execute such a settlement. The Supreme Court affirmed a decree of the chancellor, dismissing the bill. Turley, J., delivering the opinion, said that he was satisfied that the defendant never had intention to fulfil the promise, and had practiced a "gross and inexcusable fraud" upon the complainant; but it was not a fraud which took the case out of the statute. He refused to make any settlement before marriage, and she had relied upon his promise to make it after marriage. She therefore knew that there was no valid antenuptial contract, and though the court would gladly relieve her from the consequence of her "ridiculous and imprudent confidence," it was impossible to do so without impairing the statute.

§ 726. The distinction suggested in *Montacute v. Maxwell*, that the court will relieve, notwithstanding the statute, whenever there has been any actual fraud, had already been taken in several previous cases; and with respect to that question, there is nothing peculiar to this class of agreements, except that perhaps the courts are inclined to extend the doctrine somewhat further, where the fraud has resulted in the party's being drawn into a marriage, than in other cases.

§ 727. The case of *Cookes v. Mascall*, 2 Vernon, 200, A. D. 1690, is supposed to have proceeded on this ground.^(h) After the terms of a treaty of marriage between Cookes and Mascall's daughter, had been agreed upon, to the effect that Cookes's father and Mascall would

(h) Atherly on Marriage Settlements, 87; Peachey on Marriage Settlements, 83; Browne on the Statute of Frauds, § 443. Mr. Roberts seems to be unable to account for the decision. Roberts on Frauds, 194. The case is also reported, more meagerly, in 1 Equity Cases Abridged, 22.

each make a settlement of certain property, the two fathers and one Baker, an attorney, had a meeting in order to complete the agreement. Baker, having discoursed with the two fathers, proceeded to draw the agreement for the settlement; but before it was ready, they disagreed; and Mascall swore that he refused to proceed any further, assigning his reasons for the refusal. "But," the report adds, "Cooke put up what Baker had wrote into his pocket, and so they parted, and had no further meeting or treaty; but old Cooke swore, that after the articles were drawn, they were read over and agreed to; and that Mascall promised to meet at another time to execute." After this, young Cooke was permitted to go to Mascall's house, and two months afterwards married the daughter, Mascall being privy to the marriage, setting them forward in the morning, and entertaining them upon their return. The action was brought by the younger Cooke and his wife, against the two fathers; and, the report says, the elder Cooke having offered in his answer to perform the agreement on his part, the court "thought fit to decree" that Mascall should perform, according to the writing drawn by Baker.(i)

§ 728. So in *Mallett v. Halfpenny*, 1 Equity Cases Abridged, 20, A. D. 1699,(j) the defendant had given to

(i) But in 2 Vernon, 34, there is a report of the hearing, upon a bill filed two years earlier, which was apparently brought by the husband alone against his father-in-law only. There it is said, that the plaintiff relied upon a letter written to him by the defendant; and that his counsel contended that the agreement prepared by Baker, was the same in effect as the letter, but drawn more formally; on the other hand, the defendant's counsel insisted that they were essentially different, and that the evidence showed that the parties never came to any definite agreement upon the contents of the letter. The report says, that the "court inclined to dismiss the bill; but at the instance of the plaintiff's counsel, gave him a twelvemonth's time to try it at law, whether there was an agreement so fixt." In the notes to the second edition of Vernon, it is said that these are two reports of the same case; but whether this is true or not, it is probable that the letter influenced the final decision of the controversy.

(j) S. C. differently reported, 2 Vernon, 373; but in *Bawdes v. Amhurst*, Precedents in Chancery, 402, Lord Cowper stated the case, as in the text, from his own memory.

the plaintiff a writing, promising a portion with his daughter, and afterwards, designing to elude the force thereof, he "ordered his daughter to put on a good humor and get the plaintiff to deliver up that writing, and then to marry him," which she did; and "the plaintiff was relieved by the Master of the Rolls on the point of fraud, which was proved." (k)

ARTICLE II.

Whether a verbal antenuptial promise will support a postnuptial settlement in accordance therewith, or a postnuptial written agreement to make such a settlement.

§ 729. It seems to be now generally conceded, in England and in the United States, as a consequence of the rule that marriage alone is not such a performance, as will entitle the complainant to a specific execution of a verbal agreement, made in consideration thereof, that such an agreement will not suffice to protect a postnuptial conveyance of property against the attacks of creditors; and a fortiori that a recital in the conveyance of the existence of such a verbal agreement is immaterial. There are some authorities in the English reports to the contrary; but they must be regarded as having been overruled in that country by more recent well considered cases.(a) In *Battersbee v*

(k) These cases are referred to, and the general principle which they establish is recognized, in 1 Story's Equity Jurisprudence, 8th ed., § 768; Atherly on Marriage Settlements, 86-88; Peachey on Marriage Settlements, 81, 82. Also in Browne on the Statute of Frauds, §§ 441-445 a, where several analogous cases are cited, arising upon agreements for the purchase of land.

(a) Lord Chancellor Macclesfield, according to the report in 1 Strange, 237, of *Montacute v. Maxwell*, said that it had been "frequently determined" that an antenuptial verbal promise would support a settlement after marriage. According to the report in 2 Cox's Chancery, 235, of *Dundas v. Dutens*, decided in 1790, Lord Thurlow's judgment proceeded upon that very ground. He is represented as having said that "he could not conceive that a settlement made after marriage, in pursuance of an agreement before marriage, though only parol, could ever be reckoned a fraudulent settlement," and that "he was therefore clearly of opinion that the settlement" (in the case at bar) "was in itself valid." Accordingly he dismissed with costs a bill in favor

Farrington, 1 Swanston, 106, A. D. 1818,(b) Sir Thomas Plumer, Master of the Rolls, expressed his dissatisfaction with those early authorities. The only point decided by him was, that future creditors could not impeach a voluntary settlement; but, in pronouncing judgment, he said "that against all persons claiming under the settlor, the recital is conclusive; but it would be difficult to maintain that a recital, in a postnuptial settlement, of antenuptial articles, of the existence of which there is no distinct proof, would be binding on creditors. Such a doctrine would give to every trader a power of excluding his creditors, by a recital in a deed to which they are not parties."

§ 730. The same opinion had been previously expressed by Lord Northington, with respect to conveyances of real estate, (although apparently without the knowledge of the Master of the Rolls), in *Spurgeon v. Collier*, 1 Eden, 55,(c) A. D. 1758. There an absolute conveyance of an estate had been made to the defendant Collier, who executed to the grantor a defeasance of even date, on the payment of certain moneys; the grantor subsequently conveyed the property to his son; but Collier prevailed upon the latter to give up to him the defeasance. The grantor and his son having died, the heirs of the son brought this bill to redeem. The defendants Alston and wife insisted that the estate

of creditors, to set aside a postnuptial settlement, reciting that it was made in pursuance of an antenuptial parol agreement. In 1 Vesey, 196, the same case is reported quite differently; but there it is also stated that he expressed an opinion to the same effect, although the decision is represented to have been chiefly placed upon another ground. But in *Shaw v. Jakeman*, 4 East, 201, A. D. 1803, before Mr. Cox's volume was published, Lord Ellenborough stated that the point had been decided in *Dundas v. Dutens*. On the other hand, in *Randall v. Morgan*, 12 Vesey, 67, A. D. 1805, Sir William Grant, Master of the Rolls, classed this remark of Lord Thurlow, with other obiter dicta (see page 74); but he found it unnecessary to express any opinion upon the point, as he thought that, in the case before him, a verbal promise before marriage had not been sufficiently proved.

(b) S. C., *Wilson's Chancery*, 88.

(c) This volume was not published until 1818.

had been settled several years previously by Collier, upon their marriage; and consequently that they were purchasers for value; and Alston said in his answer that he had no notice of the defeasance, till two years after the marriage. The proof was that Collier had conveyed the property to them about a month after they were married, by deed reciting the marriage as the consideration; and they endeavored to show a parol agreement before marriage to settle it, and that the marriage had taken place before actual settlement, because the writings could not be finished in season. Lord Northington decreed a redemption against all the defendants, saying that the parol agreement was not proved; but that, if it had been proved, the case would not be altered; that it was admitted that since the statute, although the promise was made, Alston could have no remedy; that the settlement was therefore voluntary, because it could not be compelled. And he added: "But, if such a parol agreement were to be allowed to give effect to a subsequent settlement, it would be the most dangerous breach of the statute, and a violent blow to credit; for any man, on the marriage of a relation, might make such promise, of which an execution never could be compelled against the promisor; and the moment his circumstances failed, he would execute a settlement pursuant to his promise, and defraud all his creditors." Although the plaintiff in this case did not seek relief as a creditor, the decision is justly regarded as settling the rule, that all postnuptial conveyances of real estate, in consideration only of an antenuptial agreement, are voluntary.

§ 731. And whatever doubt may have remained, whether the same ruling would apply to conveyances and transfers of personalty, has apparently been dispelled by Lord Cranworth's judgment, in *Warden v. Jones*, 2 De Gex and Jones, 76, A. D. 1857, (d), affirming the decree of the Master of the Rolls, (Sir John Romilly), as reported in 23 Beavan, 487. (e) There it appeared that on the 16th day

(d) S. C., 27 Law Journal, N. S., Chancery, 190; and 4 Jurist, N. S., 269.

(e) Also in 26 Law Journal, N. S., Chancery, 427; and 3 Jurist, N. S., 456.

of June, 1855, the defendant Barnett, being considerably indebted to the plaintiff and others, married a Miss Jones, who was the registered proprietor of certain railway shares; that on the 6th of July, 1855, a deed of settlement was made, (not reciting any antenuptial agreement), whereby the shares were to be sold, and 500*l.* of the proceeds settled upon Mrs. Barnett and her issue; and that the same day the shares were sold, and the 500*l.* invested upon the trusts of the settlement; Barnett having applied to his own use the residue of the proceeds, after discharging an incumbrance upon the shares. This bill was filed to set aside the settlement, as fraudulent against creditors, and to reach the 500*l.* The defences interposed by the wife were, first, that the case was taken out of the statute of frauds by a parol antenuptial promise to settle the property; secondly, that she had been drawn in to be married without a settlement, by her husband's fraudulent conduct; with other defences, which are not material here. The evidence tended to show that before the marriage, Barnett had made several promises to her and to her father, that all her property should be settled upon her; that the father's consent to the marriage was given only upon condition that it should be so settled; that Barnett induced her to marry him, without the knowledge of her father or her family, upon a promise to make a settlement; that a few days before they were married, they went to the office of a solicitor, to have a settlement prepared, but he could not get it ready in time for the wedding; and that Barnett said that the marriage would make no difference, and the settlement would be equally good if made afterwards.

§ 732. The Master of the Rolls made a decree for the plaintiff; (f) and an appeal from this decree was dismissed

(f) After saying that but for the express words of the statute, equity would sustain the settlement, on the ground that the marriage was a performance of the verbal agreement, his Honor examined several of the cases in detail; concluding that *Dundas v. Dutens* was overruled by later decisions, and expressing the opinion that the cases where a representation was held to be binding, (a question fully examined in article iii of this chapter), pro-

by the Chancellor. His Lordship said that the argument that the settlement could not be fraudulent, because there was a moral obligation to perform it, was conclusively answered by Lord Northington's remarks in *Spurgeon v. Collier*; and that there was no proof that what was said to the wife, respecting the validity of a postnuptial settlement, was said fraudulently. He added that where there had been part performance by something more than a marriage, as in *Hammersley v. De Biel*,^(g) equity would relieve, but not otherwise; apparently ignoring a distinction taken by Sir John Romilly in the court below, that in the cases where that question arose, the promise was not made between husband and wife. Next he referred to the fact, that here there was no recital in the settlement of an antenuptial agreement; but he said that if the distinction taken thereupon, by Lord Thurlow, in *Dundas v. Dutens*, is correct, the whole policy of the statute is defeated. "It cannot be enough," said his Lordship, "merely to say in writing, that there was a previous parol agree-

ceeded on the ground, not only that there was some distinct act of performance in addition to the marriage, but also that the transaction was between a third person and the husband; and, for the latter reason, they were not applicable where it was between husband and wife. And he summed up his conclusions upon this part of the case as follows: "I therefore hold, that where a man enters into a parol agreement with his intended wife, and nothing follows but the marriage, the marriage cannot be treated as part performance of the parol contract; and that the carrying into effect the parol contract after the marriage, by a deed, amounts to no more than a voluntary settlement." Then, after saying that the fraud charged upon the husband consisted merely in misstating the law, as to which the wife, having employed a solicitor, "must be held to have known the contrary, or, if not, to have trusted entirely to her husband's honor," as in *Montacute v. Maxwell*; he referred to the argument, which had been pressed upon him, that if a suit had been instituted by the wife against the husband, and he had not pleaded the statute of frauds, a decree would have been made. He declined to consider what would have been the effect of such a decree upon creditors, as the question did not arise, saying that the husband was no doubt bound by the arrangement; but whether the creditors were bound, was an entirely different question: and, after disposing of the other objections, and expressing his regret at his inability to relieve the wife, he granted a decree.

(g) Post, §§ 744-747.

ment. It must be proved that there was such an agreement; and to let in such proof, is precisely what the statute meant to forbid." These remarks, his lordship continued, were made lest it might be thought that this case was decided, merely on the ground that it was distinguishable from *Dundas v. Dutens*. "I incline to think," he proceeded, "that even if this settlement had contained a statement, that it was made in pursuance of a previous antenuptial parol agreement, I should still have considered it, as I now consider it, void against creditors." (h)

§ 733. The same general doctrine, that a verbal antenuptial contract will not sustain a postnuptial settlement, as against creditors, was again asserted to be law by Sir John Romilly, in *Goldicutt v. Townsend*, 28 Beavan, 445, A. D. 1860, which is, we believe, the latest English case upon the point. There his Honor held that a bond for 5,000*l.*, given after the marriage, by the husband's father, for the benefit of his son, in pursuance of a promise to that effect, made before the marriage, could not be allowed as a claim against his estate, after his decease, to the prejudice of creditors for value; although it would be good against the surplus, after paying such creditors. But the case is not a very important authority upon this question, as the view, which the court took of the other questions, would have led to the same result, even if the law upon this point had been adjudged otherwise.

§ 734. The American authorities uphold with entire unanimity, the general doctrine of these cases; although in most of the United States, the English rule, as to the right of a creditor to attack a voluntary conveyance, has been restricted by legislative modifications of the statute of the 13th Elizabeth, or a different construction of its provisions.

(h) Although the reasoning in this case, upon the points mentioned in the text, appears to be unanswerable; it is not so clear that the defence, that the wife had an equity to a settlement, independent of the antenuptial parol agreement, was properly overruled.

In *Reade v. Livingston*, 3 Johnson's Chancery (New York), 481, A. D. 1818, Chancellor Kent, after a full and able discussion of the question upon principle and authority, held that a settlement after marriage, in pursuance of an antenuptial verbal agreement, is not valid against an antecedent creditor of the grantor. In that case there was no recital in the conveyance of the previous agreement, and the evidence that it was ever made was very loose and unsatisfactory; but the Chancellor expressed a decided opinion that if the facts had been otherwise, the decision must have been the same. The doctrine, asserted by him, that a voluntary conveyance is necessarily void as against existing creditors, is no longer law in New York; (i) but the principle that a conveyance of that character cannot be supported, as against creditors who are entitled to impeach it, by proof of an antenuptial verbal agreement, even though such an agreement may be recited in the conveyance, has been recognized by numerous American authorities, and may now be considered as settled in our jurisprudence. (j)

§ 735. It would seem to follow, from the course of reasoning and authority upon the question just discussed, that a postnuptial settlement, made in pursuance of an antenuptial verbal agreement, and without any additional consideration, is also voluntary, as between the parties and their privies. It has been said, however, that a set-

(i) *Jackson v. Post*, 15 Wendell, 588; *Babcock v. Eckler*, 24 New York, 623; *Dygert v. Remerschnider*, 32 New York, 629, ante § 711.

(j) *Andrews v. Jones*, 10 Alabama, 400; *Izard v. Izard*, Bailey's Equity (South Carolina), 228; *Borst v. Corey*, 16 Barbour (New York), 136; *Wood v. Savage*, 2 Douglass (Michigan), 316; *Satterthwaite v. Emley*, 3 Green's Chancery (New Jersey), 489; *Smith v. Greer*, 3 Humphreys (Tennessee), 118; *Saunders v. Ferrill*, 1 Iredell (North Carolina), 97; *Bayard v. Hoffman*, 4 Johnson's Chancery (New York), 450; *Blow v. Maynard*, 2 Leigh (Virginia), 29; *Jones v. Henry*, 3 Littell (Kentucky), 427; *Albert v. Winn*, 5 Maryland, 66; *Kinnard v. Daniel*, 13 B. Monroe (Kentucky), 496; *Dygert v. Remerschnider*, 32 New York, 629; *Davidson v. Graves*, Riley's Chancery (South Carolina), 219.

tlement, made for the benefit of the wife or children of the settlor, may be sustained as founded upon a valuable consideration, on the ground that it is the duty of every man thus to provide for his family.^(k) But this doctrine has since been overruled; and it would seem, upon principle, that such a settlement can derive no additional force from the fact that it was made in pursuance of an antenuptial verbal agreement. There are, however, some dicta to the

(k) Lord St. Leonards says upon this question: "A settlement after marriage upon a wife or children, without any previous agreement, is upon good although not valuable consideration. It is a performance of a moral obligation. The mere agreement by parol, before marriage, to make such a settlement, does not place the case higher. The settlement is still only a performance of a moral obligation, for the parol promise is rendered unavailable by the statute of frauds. In each case the consideration is a good one, but it is a duty of imperfect obligation on the party to make the settlement. The past consideration of marriage will not support the settlement, and the previous parol promise is not binding; therefore the settlement is merely voluntary." Sugden on Powers, eighth edition, p. 649. Lord St. Leonards, while chancellor of Ireland, decided that a written promise by a father to his son-in-law, to secure an annuity to the daughter of the promisor and wife of the promisee, would be specifically enforced, upon a bill filed by the husband and wife; on the ground that although the consideration was not valuable, it was meritorious, and that equity would interfere in cases where the consideration was of that character. *Ellis v. Nimmo*, Lloyd and Goold, temp. Sugden, 333, A. D. 1835; where the former authorities are cited and discussed at length. But it is said that his successor affirmed the decree upon other grounds. And Lord Chancellor Cottenham, although in deciding *Dillon v. Coppin*, 4 Mylne and Craig, 649, A. D. 1837, where the point arose, he made no express mention of *Ellis v. Nimmo*, explicitly disapproved of the latter in *Jefferys v. Jefferys*, Craig and Phillips, 138, A. D. 1841, and refused to make a decree under similar circumstances. Vice Chancellor Shadwell also disapproved of the doctrine of *Ellis v. Nimmo*, in *Holloway v. Headington*, 8 Simons, 324, A. D. 1837. And in *Moore v. Crofton*, 3 Jones and La Touche, 438, A. D. 1846, Lord St. Leonards said, that although he thought *Ellis v. Nimmo* was decided upon sound principles of equity, he was aware that the opinion of the profession was otherwise; and he added (page 443): "I consider that decision to be overruled by the current of opinion and authority, and I have no desire to support it against the general opinion." These observations are quoted substantially to the same effect, although his Lordship's concession is not made quite so graceful, in S. C., 9 Irish Equity Reports, 347, 348.

contrary, and it has even been said that a recital in the conveyance of such an agreement is conclusive evidence of its existence, as against the settlor and those claiming under him.⁽¹⁾ In what manner, or for what purpose, the recital is thus conclusive, the cases do not very clearly point out. Perhaps it may be regarded as the written memorandum, which the statute requires; the sufficiency of which will be the subject of discussion hereafter.

§ 736. We suppose that the case of *Argenbright v. Campbell*, 3 Hening and Munford (Virginia), 144, A. D. 1808, must have proceeded upon the ground that the settlor was concluded by such a recital, if indeed the decision can be supported. There the plaintiffs founded their title to relief upon a verbal promise, made by a father to his daughter's intended husband, to the effect that if he married the daughter, he would leave her his land by his will. The case is exceedingly voluminous, and the testimony was very conflicting; but the facts upon which the majority of the court proceeded, in determining this question, appear to have been briefly as follows. The father had made his will, before the engagement, whereby he had devised his land to this daughter (Rebecca), subject to the payment of 50*l.* to another daughter (Hannah). After the engagement was formed, he expressed his satisfaction with the intended marriage to the daughter's suitor, and promised the latter, that if it took place, "he should have the plantation he then lived on, provided he complied with the terms of the will; and then repeated the contents thereof." The marriage took place; and afterwards, the father manifesting a design to alter his will, he was, after considerable solicitation, persuaded to sign an instrument in writing, in the form of a penal bond; the condition of which recited the marriage; that he had agreed to give the land to his son-in-law, and his heirs forever, after his own decease;

(1) *Battersbee v. Farrington*, 1 Swanston, 106, ante § 729; *Satterthwaite v. Emley*, 3 Green's Chancery (New Jersey), 489; *Blow v. Maynard*, 2 Leigh (Virginia), 29.

and the better to comply with that promise, had made his will, in which he had bequeathed the land to his son-in-law, and his heirs; and had promised that it should be his last will, as far as it related to said lands; whereupon it was provided that the obligation should be void, in case the father should not alter that will, with respect to the land in question, or convey the land to any person before his decease. (m) Afterwards the defendant Argenbright, with full notice of the facts, purchased the land from the father. A bill was thereupon filed by the son-in-law and his wife, against Argenbright and the wife's father; and the latter having died, pending the action, a decree was made in the court below, which was modified by the Court of Appeals, so as to require the defendant Argenbright to convey the land to the wife, and account for the rents and profits since the father's death; and to require the husband to pay Hannah 50*l.*, with interest from the same time; and in that form it was affirmed by a majority vote. The prevailing opinions substantially concurred, in holding that the previous verbal promise was a sufficient consideration, to uphold the writing as an agreement; that the latter was intended to conform to the antenuptial promise, the variance between the two resulting from ignorance of the law or of the contents of the will, by the draftsman; and that it might be corrected by the will, to which it referred, as "forming the standard by both parties."

§ 737. But a voluntary postnuptial settlement, like every other executed agreement, is valid between the parties and those claiming under them as volunteers. This principle was applied in a remarkable manner, in the case of *Houghton v. Houghton*, 14 Indiana, 505, A. D. 1860. There an action was brought by a widow, against the

(m) Owing to the manner in which the instrument was executed, there was much doubt whether it was in legal effect a bond; one of the judges composing the majority said that the question was immaterial, and the complainants were entitled to relief, whether it should be treated as a bond or an agreement; the other judge apparently, though not explicitly, concurred with him on this question.

administrator of her husband, to recover a sum of money allowed to the widow, by the statute of descents, etc., before any distribution. The defence was that the plaintiff and the intestate made a verbal antenuptial agreement, to the effect that the intestate would pay her, during coverture, one third of the net profits of his land to her separate use, and claim no right to the control of her property, during coverture or afterwards; but it should all go to her children by a former marriage, if not otherwise disposed of by her; and she relinquished all claim to any portion of his property, after his death, and agreed that it should all go to his children by a former marriage, if not otherwise disposed of by him. The husband performed as much of this agreement as he was to perform during the coverture; but the court below held that it was invalid, and rendered judgment for the plaintiff; which was reversed on appeal. The reason assigned by the appellate court for its decision, was that inasmuch as the property, to which the plaintiff relinquished her right, was in the husband's possession, and after his death in his administrator's possession, no act was required to be done by her, in further execution of the agreement on her part; so that it was fully executed by both parties. Several cases were then cited, where verbal postnuptial agreements have been sustained, and the opinion proceeded: "The foregoing cases show that the contract might have been valid, even if it had been made during coverture. It was affirmed and executed during that relation."

§ 738. This case appears to be directly contradicted by *Finch v. Finch*, 10 Ohio, New Series, 501, A. D. 1860, which has been already cited in connection with another point made by the defendants in support of their answer.⁽ⁿ⁾ There the defendants also insisted that the agreement was taken out of the statute, because it had been partly performed. The acts of performance relied upon after the marriage, were the actual use and enjoyment by the wife

(n) See ante, § 717, where the facts are fully stated.

of her property with the husband's assent, and particularly that she was permitted by him to give her personal property and the rents of her lands to her children by a former marriage. Upon this point, Brinkerhoff, C. J., said, that at the time of the marriage, the agreement was binding upon neither party; and that when the marriage was completed, the husband became the owner of her personal property, and of the proceeds of her real estate. Consequently any gifts which he may have permitted her to make were his gifts; that the parties could not occupy antagonistic relations with respect to the subject of the agreement, because no legal obligations rested upon him; and what he permitted her to do was a matter of mere grace and favor. "Had he seen proper," continued the learned Chief Justice, "to make these gifts to her children without her consent and against her remonstrances, would they have constituted a part performance? This, we suppose, would not be claimed; and yet in legal effect, they would have been the same as they were when made by her with his consent. In either case they were his gifts." The court also repudiated the distinction, taken in *Crane v. Gough*,^(o) between an action and a defence, founded upon an agreement within the statute.

§ 739. There is a very close similarity between this question, as it was presented in these two cases, and that arising in some of the cases, where the allegation was that there was a distinct consideration for the agreement, in addition to the marriage;^(p) and it is even more difficult in this description of cases, than in the other, to determine what is the true rule. In each the difficulty springs out of the equivocal character of the acts of performance relied upon. But here the question relates to the effect of such acts upon a verbal agreement plainly within the terms of the statute; and the doubt grows out of the fact that the conduct of married persons towards each other, in matters

(o) Ante, § 712.

(p) See chapter xix, article iii.

of property, is not to be tested by the rules, which determine the effect of similar acts, between persons who occupy no such relations to each other. The facts proved in *Houghton v. Houghton* and in *Finch v. Finch* would be sufficient to establish the agreement and its subsequent performance, if they had transpired between strangers; but passing between husband and wife, they are quite consistent with the theory, that the husband merely adopted a particular method of supplying the wife with money for her personal use. Still it is but reasonable to conclude, that a long continued and uniform course of conduct, on the part of the husband, either by acquiescence or by affirmative action, inconsistent with his marital rights, is an act of performance of some agreement on his part. But the extent and character of the agreement, which such acts indicate, and their effect upon the question whether it was antenuptial or postnuptial, must perhaps be left to depend upon the circumstances of each particular case.

§ 740. But it is evident that if the acts of performance, upon which the party relies, are of such a character, as to indicate clearly that their continuance was dependent entirely upon the pleasure of the person performing them, they cannot be made available as evidence of any definite and binding agreement. The most familiar and obvious illustration of this proposition, is where one party relies upon a will made by the other. There are some nice distinctions in the cases, as to the effect of a contract to be performed by making or not making a will, or not altering a will already made; but it is sufficient for our present purpose to say, that while a contract to leave a particular sum of money, or certain specified property, by will, may be specifically enforced; (q) it is well settled that the execution

(q) *Hammersley v. De Biel*, 12 Clark & Finnelly, 45, post § 744; *Loffus v. Maw*, 3 Giffard, 592. A contract to "recognize" a son in a will, "in common with the rest of my family," is too vague to be enforced. *Kay v. Crook*, 3 Smale & Giffard, 407; 3 Jurist, N. S., 104. So where a testator had already made a will, bequeathing 12,500*l.* to his daughter; and in her marriage pro-

of a will cannot be relied upon as evidence that such a contract was made between the parties, or as an act of performance which will take a verbal antenuptial agreement to that effect out of the statute. This was one of the points determined in *Caton v. Caton*, Law Reports, 1 Chancery Appeals, 137, a summary of which will be given in the following article.(r)

§ 741. A similar rule was laid down, in *Potts v. Merrit*, 14 B. Monroe (Kentucky), 406, A. D. 1854. This was a bill brought by a wife against her husband, and a person to whom he had either sold or given certain slaves, the property of the wife before marriage. The complainant founded her title to relief upon a verbal antenuptial agreement between her and her husband, by which she was to retain the title to her slaves, and have the control and power of disposition of them, notwithstanding the marriage. It appeared that after the marriage, the husband executed an instrument in writing, "purporting to be a conditional ratification, or rather adoption of a will, which had been previously signed and acknowledged by the complainant," bequeathing the slaves to her brother; but that

posals he stated that he would give her 2,000*l*. as a portion, and in addition, that "she is and shall be noticed in my will, but to what further amount I cannot precisely say," it was held that there was no binding contract beyond the 2,000*l*. *Moorhouse v. Colvin*, 18 Beavan, 341; 21 Law Journal, N. S., Chancery, 177; S. C. on Appeal, 21 Law Journal, N. S., Chancery, 782. But a marriage contract to give, by will or otherwise, to a niece, "so much in money or in valuable effects," as the party should, by his will, give or bequeath to his next of kin, or any other person, will be specifically enforced, although it is in the form of a bond with a penalty. *Logan v. Wienholt*, 1 Clark and Finnelly, 611. And a contract to leave a daughter "her share of whatever property I may die possessed of," will entitle her to a decree for an equal share of the testator's personal property, after deducting the widow's one third, and debts and expenses. *Laver v. Fielder*, 32 Beavan, 1; 32 Law Journal, N. S., Ch., 365; 9 Jurist, N. S., 190; 11 Weekly Reporter, 245; 7 Law Times, N. S., 602. See also *Barkworth v. Young*, 26 Law Journal, N. S., Chancery, 153; 4 Drewry, 1; and *Loxley v. Heath*, 27 Beavan, 523; S. C. on appeal, 1 De Gex, Fisher and Jones, 489.

(r) See §§ 756-758.

afterwards he had transferred them to the defendant Merrit for a merely nominal consideration, and had executed an express revocation of the former instrument. The Court of Appeals, affirming a decree of the Circuit Court, held that the antenuptial verbal agreement was not saved from the operation of the statute, by the subsequent instrument executed by the husband; even if the latter could be regarded as an admission that the bequest was made in pursuance of the agreement; and that the instrument was in fact merely a will, revocable at the pleasure of the husband.

ARTICLE III.

Whether, in the absence of fraud, equity takes any distinction, for the purpose of enforcing specific performance, between an antenuptial verbal agreement, and an antenuptial verbal representation of an intention.

§ 742. We should leave this discussion in a very imperfect and unsatisfactory state, if we were to close it without bestowing some attention upon a question, which seems to have attained all its prominence in the English equity courts, within the last twenty five years; and yet has already become, to use the language of an eminent judge, "one of the most difficult and important, and the most perplexed by authority, of any of the heads of equity. (a) We approach it with much hesitation, not only in consequence of its perplexing character, and the conflict of opinion between the greatest equity lawyers, to which it has given rise; but also because the cases where it has been discussed, are so voluminous, and the distinctions between them are so nice, as to render the task of condensation within reasonable limits, without running into obscurity, exceedingly delicate and arduous.

§ 743. The doctrine to be examined appears to proceed from the conflict, which has already been mentioned, be-

(a) Sir John Stuart in *Williams v. Williams*, 37 Law Journal, N. S., Chancery, 854, post §§ 759, 760.

tween the express terms of this provision of 1 frauds, and the familiar equitable rules, were granted, under certain circumstances, to a party who performed a verbal agreement within the statute. They have been reluctantly compelled to hold, that the marriage, contracted upon the faith of a verbal agreement, amply fulfils every condition upon which the interference of equity in other cases, yet the language of this provision requires them to deny it wherever it applies; notwithstanding the claim of extreme hardship, which generally presents itself when the question arises. But it is quite clear on principle and authority, that the statute is confined to *agreements*, and that it has no application to *promises*. (b) And thereupon this question arises when one party in addition to promising, or promising to do some act for the benefit of the consideration of the latter's marriage, represents his intention to do the act, in case the marriage is contracted, the latter, having contracted thereupon the faith thereof, is entitled to maintain an action, for the purpose of enforcing the fulfilment of the representation.

§ 744. The perplexities, which now surround the subject, may be traced to the remarks of certain judges rather than to the effect of the determination, in the case of *Hammersley v. De Biel*, decided by the House of Lords in the year 1845, and reported in 12 *Finnelly*, 45; also known as *De Biel v. Thomson*, which title the decision of the Master of the Rolls is reported in 3 Beavan, 469, A. D. 1841. This was brought by an infant against the executors of J. Thomson, his grandfather, to obtain payment of the assets of 10,000*l.*, to which he insisted he was entitled under the provisions of a memorandum entered into with his father, (the Baron de Biel,) and two of the s

(b) See ante, §§ 683-686.

Thomson, acting in the latter's name, in his behalf, and by his authority, in contemplation of the marriage of the Baron with Mr. Thomson's daughter. Several points were taken in the cause, but it is believed that the following is a statement of all that is material upon this question. The memorandum, (which was not subscribed by any one,) besides mentioning certain provisions which Mr. Thomson proposed to make immediately for his daughter and the issue of the marriage, recited that the Baron de Biel was to obtain the means of settling on her a jointure of 500*l.* per annum during her life, in case she should survive him, secured upon his estate in Mecklenburg; and that Mr. Thomson "intends to leave a further sum of 10,000*l.* in his will to Miss Thomson, to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father." Baron de Biel accordingly secured to Miss Thomson a yearly jointure of 500*l.* out of his estate, his brother joining in the instrument, as required by the local law; and shortly afterwards the marriage took place, without any further settlement being made; but after the marriage, a settlement was prepared and executed, whereby Mr. Thomson made the provisions mentioned in the memorandum, except the one relating to the 10,000*l.*, which he was to leave by his will; and that provision was not mentioned in the settlement. The Baroness died during the year following the marriage, leaving the plaintiff her only child; and about eleven years afterwards, Mr. Thomson died; and his will made no provision for the 10,000*l.*

§ 745. Three defences were interposed by the executors; one of which was that the memorandum was a mere proposition, not an agreement, and another that it was void by the statute of frauds, because it was not signed. Upon the latter point the Master of the Rolls (Lord Langdale,) said that inasmuch as it appeared that after the marriage Mr. Thomson wrote a letter to Baron de Biel, referring to the memorandum, as stating the terms of the engagement made by him before the marriage, this letter was either a sufficient

note of the agreement signed by the party to be charged, or a sufficient recognition of the use of his name in the memorandum; "and, so thinking," continued his Lordship, "it does not appear to me to be necessary to determine whether the use of the name in the memorandum, be, of itself, a sufficient signature of Mr. Thomson by his agents; or whether the provision of the jointure by Baron de Beil takes the case out of the statute; or whether, independently of the statute, this court, for the prevention of fraud, would compel the defendants to realize the expectations on the faith of which the marriage was contracted." His Lordship then said that by the execution of the settlement and the solemnization of the marriage by the Baron de Beil, the proposals and intentions, which were previously subject to revision, became an agreement which Mr. Thomson was bound to perform; and he accordingly made a decree for the payment of the 10,000*l.* and interest.

§ 746. An appeal having been taken from this decision to the Lord Chancellor, (Lord Cottenham,) it was affirmed, and the appeal dismissed. Lord Cottenham's opinion is given in a note to 12 Clark and Finnelly, 61. Upon the question whether there was any binding agreement between the plaintiff's father and Mr. Thomson, he said that if it was necessary to find a contract, such as usually accompanies transactions of importance, "there may not be found in the memorandum, or in the other evidence in the cause, proof of any such contract;" but that no formal contract was required. "A representation," he continued, "made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general, be sufficient to entitle him to the assistance of this court for the purpose of realizing such representation." And after citing several authorities, his Lordship concluded this branch of the case, by saying that he was of opinion "that the expressions used in the proposed arrangement, acted on as they were, became obligatory on the party on whose behalf the proposition was made." Upon the question whether the defence could be sustained under the

statute of frauds, he thought that the writing of Mr. Thomson's name several times in the body of the memorandum was a sufficient signing : but that independently of this, the letter was sufficient for the reason given by the Master of the Rolls. And his Lordship also added : "This case does not rest solely upon that ground ; for though it has been decided that a marriage is not per se a part performance of a parol agreement, so as to take the case out of the statute, there was, in the dealing between these parties, an important act by the intended husband in execution of the proposed arrangement. He was informed by it that the arrangement proposed would be sufficient for him to act upon, and that he should forward, as early as possible, a joint engagement for himself and his brother, settling 500*l.* a year on the intended wife, which was done."

§ 747. An appeal from Lord Cottenham's decree was taken to the House of Lords, where it was affirmed ; but the question under the statute of frauds did not arise, the counsel for the appellant having withdrawn the point, in consequence of his "seeing a strong inclination of opinion against him." The speeches delivered in the House of Lords consequently turned chiefly upon the question, whether the memorandum was binding upon Mr. Thomson, upon principles independent of the statute ; and of these, the determination of the court, respecting the nature of the liability which it created, is alone important here. The then Chancellor, (Lord Lyndhurst,) after arguing that the provision in question was not to be optional with Mr. Thomson, stated the rule to be "that if a party holds out inducements to another, to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents, and celebrates the marriage in consequence of them ; if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed, and will give effect to the proposal." Lord Brougham reviewed the evidence at some length, and concluded that the memorandum was in truth an agreement,

and one of a very formal nature ; but he said that he agreed with and adopted all the arguments of the judges below. Lord Campbell expressed his concurrence with the opinions of Lord Lyndhurst and Lord Brougham ; but after saying that the objection arising under the statute of frauds was clearly untenable, in consequence of the letter of Mr. Thomson, he added that he fully agreed with Lord Cottenham in his doctrine, (quoting the latter's language,) as to the effect in equity of a representation made to influence another party, and acted on by him ; and that unless that was the rule the most monstrous frauds would be committed. "Some fraudulent father," said his Lordship, "might hold out to the suitor of his daughter, that he meant to make a settlement upon his daughter and her issue. The marriage would take place in the belief that that settlement would be made ; and then, after the marriage, he might say, 'This was only an intimation of my intention at the time ; I have changed my mind, and I will not give her a shilling.' That would be most unjust ; and to prevent such frauds, this doctrine has been laid down, and I think has been most properly laid down, and ought to be acted upon." But his Lordship also said that here was more than a representation, for the memorandum was a formal instrument ; that the Baron de Biel had done all that which they expected him to do, that is, to settle the 500*l.* a year upon his wife, if she survived him ; and that a very useful and necessary rule would be infringed upon, unless the House should "hold in this case that the contract was binding."(c)

(c) It will be noticed that the Master of the Rolls rested his judgment in this cause, entirely upon the idea that there was a *contract* between the Baron and his father-in-law ; and that if the memorandum was in any respect deficient in satisfying the requirements of the statute of frauds, all such deficiencies were supplied by the subsequent letter. Regarding it as a contract, it would seem clear that the marriage alone would have sufficed to entitle the plaintiff to relief, had there been no mention in the memorandum of the jointure ; and the effect of the settlement of the 500*l.* per annum was (not to control the application of the statute, but) merely to fulfil a condition precedent, in addition to the marriage, created by the peculiar

§ 748. But if the principles laid down in *Hamnersley v. De Biel* tend to weaken the authority of the cases, holding that marriage alone will not entitle a party to the specific performance of a promise, the result is not attained without repeated disclaimers of such an effect, by the judges who determined it, and by other eminent equity judges. In *Lassence v. Tierney*, 1 Macnaghten and Gordon, 551, A. D. 1849, (d) Lord Cottenham again disavowed any intention to infringe upon the rule previously established. This case presented, with other questions, one arising out of an antenuptial parol agreement between husband and wife, to the effect that the husband should invest 3,000*l.*, part of the wife's property, in the purchase of a government annuity for his life, and for his own benefit; that she

provisions of the instrument. Had the two appellate courts simply concurred in the views of Lord Langdale upon this question, the case would have been an authority under the statute of frauds, only with respect to the sufficiency of the writing; but Lord Cottenham distinctly intimated that here was no contract; and he based his judgment upon the effect in equity of a representation, treating a representation of an intention to do an act, as having the same effect in equity as a representation of an existing fact, designed to influence the conduct of another, and upon the faith of which the latter has acted. If such was indeed the character of the transaction, and if his Lordship correctly stated the equitable rule applicable to such a representation, it appears to be quite unimportant whether there was or was not any writing; for, as we have already often remarked, the statute speaks only of an agreement, not of a representation. And the statute of frauds being out of the way, the same consequence must follow from Lord Cottenham's ruling upon the effect of a representation, which follows from that of the Master of the Rolls, upon the effect of a contract; namely, that unless the representation was by its terms conditional upon the performance of some act, in addition to the marriage, the completion of the marriage would, of itself, entitle the person to whom it was made, to call upon the court to decree a specific performance. The same observations apply to the reasoning of Lord Lyndhurst; to Lord Brougham's general approval of Lord Cottenham's ruling; and, particularly, to that part of Lord Campbell's argument, which treats the memorandum as a representation. Indeed, it would appear from the latter's illustration that he fully accepted the consequences of his reasoning; although Lord Cottenham and Lord Lyndhurst took great pains to disclaim them.

(d) S. C., 2 Hall and Twells, 115; 14 Jurist, 182.

should be entitled to hold and enjoy all the residue of her property to her separate use; and that, if necessary, a proper settlement should be executed by them respectively. The wife had filed a bill setting forth this agreement, and that it had been executed by investing the 3,000*l.*, and praying that her rights might be declared; and afterwards an indenture had been made between her husband, herself, and a trustee, purporting to be a settlement in accordance with the terms of that agreement; but it had never been acknowledged by the wife as required by the statute of 3d and 4th William IV. The wife having died, the husband filed this bill of revivor and supplement against her heir at law, praying that the antenuptial verbal agreement might be enforced, and for that purpose, that the defective acknowledgment of the deed of settlement might be supplied; and that her will in his favor, executed in pursuance of a power given to her in the settlement, might be established, as a valid execution of the power.

§ 749. The Vice Chancellor dismissed the bill, and upon appeal his decision was affirmed by the Chancellor. His Lordship thought that the evidence of the agreement was not sufficient to charge the heir; but upon the merits no case had been made against him. The alleged contract was entirely for the benefit of the wife; nothing had been given up by the husband; he was to take the 3,000*l.* which he did take, and contracted that the wife should enjoy the rest of her property. After some further comments upon the facts, his Lordship proceeded to say that if the wife had been living nothing could have been asserted against her, because "there is nothing against her but a parol contract before marriage, and nothing but marriage following, which will not support the contract; and such a contract cannot be carried into effect under the statute of frauds." And he added that he took care in *Hammersley v. De Biel* to guard against any conclusion to the contrary, by saying that it was distinguishable, because in that case, the husband having contracted, before marriage, to do something, and having done it, there was part performance

of the contract, relating to property to which he was entitled; and the question turned upon whether the persons who assumed to contract for the wife's father, were authorized so to do. His Lordship also mentioned two other reasons for dismissing the bill in the case before him; and he said that either of the three was sufficient to dispose of it, as between the devisee and the heir.

§ 750. Another eminent equity judge expressed the same opinion, in *Surcome v. Pinniger*, 22 Law Journal, New Series, Chancery, 419, A. D. 1853.(e) There the question was, whether Mr. Chartres, the son-in-law of Mr. Aylwyn, an intestate, or the administrator of Mr. Aylwyn, was entitled to certain moneys which had been paid into court, as the price of certain leasehold property, which a corporation had taken under an act of Parliament. The material facts were, that after Mr. Chartres had proposed marriage to the daughter of Mr. Aylwyn, the latter informed him that it was his intention to give the property in question, of which he held the leasehold title, to them on their marriage; and, after their marriage, he gave up possession to Mr. Chartres, delivered to him the lease and other documents, and directed the tenants to pay their rents to him; and Mr. Chartres went to reside in the house, expended a considerable sum of money in repairs, and received the rents for such parts of it as he did not occupy. The Vice Chancellor directed the money to be paid to Mr. Chartres; and this order was affirmed by the Lords Justices. Lord Justice Knight Bruce, after reciting the facts, merely added that it had been often decided, that under such circumstances, a parol agreement will be taken out of the statute of frauds; but Lord Justice Turner referred to *Hammersley v. De Biel* and *Lassence v. Tierney*, saying that there was no conflict between them, and here there had been part performance of the parol agreement, by delivery of possession to Mr. Chartres, and a considerable expenditure by him upon the property: it was not therefore a case where

(e) S. C., 3 De Gex, Macnaghten and Gordon, 571; and 17 Jurist, 196.

the parol contract had been merely followed up by marriage; and this was the ground upon which the two cases mentioned were distinguishable from each other.

§ 751. But, in *Maunsell v. White*, 4 House of Lords Cases, 1039, A. D. 1854, (f) their Lordships, apparently pressed by the conclusions, which, notwithstanding the disclaimers already mentioned, counsel drew from some of the reasoning in *Hammersley v. De Biel*, distinctly asserted that, in that case, the decision proceeded upon the ground that the memorandum was a contract. Here it was held, affirming the decree of Sir Edward Sugden, as Chancellor of Ireland, that a letter to an intended husband, written by his uncle, in answer to an application of the guardians of the intended wife for a settlement; in which the uncle stated that he had made his will, leaving to the nephew certain estates therein mentioned; was not, under all the circumstances, a representation, or an agreement, which entitled the nephew, after the uncle's death, to maintain a suit in equity, to have the estates conveyed to the uses of the marriage. It appeared that the guardians did not consider the letter as satisfactory; and that in answer to a communication from them to that effect, the uncle had written again to the nephew, in such terms as to imply quite clearly, that although he had no expectation of altering his will, yet he intended to reserve the power of disposition of the property; and the marriage took place after the receipt of the second letter. The decision might well have been placed upon the meaning of the letters only; but the doctrine of *Hammersley v. De Biel* was discussed at considerable length in the two speeches delivered, with the result just mentioned. It is however quite difficult to reconcile what fell from Lord St. Leonards, in this case, with some of his remarks in the case immediately succeeding it. (g)

(f) S. C., in the court below, 7 Irish Equity Reports, 413; and 1 Jones and La Touche, 539, A. D. 1844.

(g) Lord Cranworth, who had succeeded Lord Cottenham as chancellor after discussing the facts, for the purpose of showing that the uncle never intended to fetter himself absolutely, and that the other parties had no right

to assume otherwise, said: "In *Hammersley v. De Biel*, it was successfully insisted that there was a contract to leave a sum of money;" but here the counsel for the appellant had treated the rule of law affecting representations, as being distinct from the rule of law which affects contracts, although he said that a representation acted upon was binding as a contract. But his Lordship said that, if the party had made no contract, there was nothing that he was bound to fulfil. If the representation was of an existing fact, equity will bind him, treating it as a contract, when it was made with a view to induce others to act upon it, and they had done so. "There is," said his lordship, "no middle term, no tertium quid, between a representation so made, to be effective for such a purpose, and being effective for it, and a contract; they are identical. That which leads to the representation being made and acted on determines its nature, gives it the character of a contract, or leaves it a mere representation." And his Lordship added that he did not regard the word "representation" as very happily employed in the speech of Lord Cottenham, delivered in *Hammersley v. De Biel*; that the only distinction which he understood was that some words, which do not amount to a contract in one transaction, may possibly be held to do so in another; and that in *Hammersley v. De Biel* the circumstances gave the words the character of a contract. Lord St. Leonards, whose judgment was then under review, spoke substantially to the same effect. He said that "a representation, which is made as an inducement for another to act upon it, and is followed by his acting upon it, will, especially in such a case as marriage, be deemed to be a contract;" and that in *Hammersley v. De Biel* there was not merely a representation of what was probable to occur; but on one part a proposal, accompanied with a condition required of the other party; and that the proposal was accepted, the condition complied with, and there were therefore all the requisites of a binding contract. "If," continued his Lordship, "a man makes a proposal in that manner, and it is accepted, and is followed by a marriage, though the affair may have begun by being a proposal, it has ended by becoming a contract that was binding on all the parties concerned." But in this case, his Lordship said that there was a simple representation by the uncle; and no doubt it was a true statement of what he had done and what he intended. Doubtless also the parties acted upon it, but not as an engagement, which could not be revoked; only as a "statement made by a relation, whose affection, if it remained what it then was, would give the nephew the property, in accordance with that statement." His Lordship then said that upon the theory of the appellant, the uncle became a mere tenant for life, without the powers of a tenant for life over his own estate; and that all the circumstances showed that he never

(h) S. C., 23 Law Journal, N. S., Chancery, 865.

Money against Mr. and Mrs. Jorden and other parties, praying that a debt of 1,200*l.*, secured by a bond and a warrant of attorney given by the plaintiff to Charles Marnell, upon which a judgment had been entered up, might be declared to have been abandoned, and satisfaction entered up, etc. The material facts upon which this question arose were as follows. (i) Mrs. Jorden, who married quite late in life, was a sister of Charles Marnell, and she and her brothers were from youth on very intimate terms with the plaintiff's father, George Money, from whom they had received many substantial benefits. This intimacy afterward extended itself to the plaintiff, who was much Miss Marnell's junior, and whom she treated with great affection. In 1841, the plaintiff, then a very young man, became indebted to Charles Marnell in this sum of 1,200*l.*, under circumstances quite discreditable to the latter; and in 1843, Charles Marnell died, having by his will left all his property to Mrs. Jorden, then Louisa Marnell. She was acquainted with all the circumstances under which the bond and warrant of attorney were given, and had frequently expressed her strong disapprobation of her brother's conduct in that matter; and after the latter's death, she often declared to the plaintiff and others, that she had abandoned and never intended to enforce the debt against the plaintiff. This statement was repeated by her in various forms, and always in very emphatic language.

§ 753. In 1844, the plaintiff became engaged to be married to Miss Poore; and he informed her and her mother, Lady Poore, of the circumstances under which he contracted the debt of 1,200*l.*, and of Miss Marnell's declarations with respect thereto. It was considered necessary by both families, with a view to the solemnization of the mar-

intended to place himself in that position, nor did the parties understand that he had done so. Lord St. Leonards had previously criticised the decision in *Hammersley v. De Biel*, much to the same effect, in his treatise on the Law of Property, etc., pages 53 to 56.

(i) Another question which arose in this cause has been stated, ante, § 704.

riage, and the execution of a proper settlement thereon, that the plaintiff should be secured against any future demand for the payment of the 1,200*l.*; and, with that view, various conversations took place between Miss Marnell and the father and mother of the plaintiff. In these conversations, the intended marriage was referred to, and she reiterated her assurances, in various forms, that she would never use the papers against the plaintiff, and he should never be called upon to pay any thing upon the debt. In answer to applications to surrender the bond and warrant of attorney, she said that she must be trusted; that she wanted to keep the papers to use them against one Hooper, (who was also liable for the 1,200*l.*, but probably not jointly); that she had made her will, leaving every thing to the plaintiff; and when she died, he might burn them. Upon the faith of these statements, communicated to Lady Poore, the latter settled upon the plaintiff the first life interest in her daughter's property, and the marriage took place in August 1845. Two or three years afterwards Miss Marnell married Mr. Jorden; and in 1849 the plaintiff was called upon to pay the debt; whereupon this bill was filed.(j)

§ 754. The Master of the Rolls, (Sir John Romilly,) granted a perpetual injunction.(k) From this decree the defendants appealed; and the Lords Justices being divided in

(j) There was a preliminary motion in the cause, from the report of which some additional facts may be collected. 20 Law Journal, N. S., Chancery, 174; 13 Beavan, 229.

(k) Money v. Jorden, 21 Law Journal, N. S., Chancery, 531; 15 Beavan, 372, A. D. 1852. Sir John Romilly placed his decision in the Rolls Court, upon the ground that Miss Marnell's declarations that she would never enforce the bond, were made for the purpose of being communicated to the plaintiff, and to Lady Poore, and the other friends of Miss Poore, previously to the marriage; that they were so communicated; and that the marriage took place and the settlement was made upon the faith thereof. This, he thought, was sufficient to entitle the plaintiff to relief, upon the principles whereby persons are required in equity to make good their representations; and he therefore forebore from expressing any opinion as to the other points in the case.

opinion, (Sir J. L. Knight Bruce for affirmance, and Lord Cranworth for reversal), the decree was affirmed.^(l) An appeal was again taken by the defendants to the House of Lords, where Lord Cranworth, who had been made chancellor since the decision in the court below, united with Lord Brougham, in reversing the decision, against the opinion of Lord St. Leonards. The speech of Lord Cranworth, upon the question now under examination, was to the effect, that in order to raise an equity upon the ground of representations, there must have been misrepresentations of existing facts, and not mere representations of intentions; and that regarding the plaintiff's right to relief, as founded upon the fact that he had contracted his marriage upon the faith of Miss Marnell's representations, they were merely representations of intentions, and could not be treated as creating a contract, for want of such a writing as the statute of frauds requires.^(m) In this con-

(l) *Money v. Jorden*, 2 De Gex, Macnaghten and Gordon, 318; and 21 Law Journal, N. S., Chancery, 893, A. D. 1852.

(m) The following is that portion of Lord Cranworth's argument, in which he discussed the question arising under the statute of frauds. "I think that that doctrine" (that a person is bound to make good a representation, made to influence another's conduct, and upon which the latter has acted,) "does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do. In the former case it is a contract, in the latter it is not. What is here contended for, is this: that Mrs. Jorden, then Miss Marnell, over and over again represented that she abandoned the debt. Clothe that in any words you please, it means no more than this, that she would never enforce the debt; she does not mean in saying that she had abandoned it, to say that she had executed a release of the debt, so as to preclude her legal right to sue. All that she could mean was that she positively promised that she never would enforce it. My opinion is that if all the evidence had come up to the mark, which, for reasons I shall presently state, I do not think it did; that if, upon the very eve of the marriage, she had said, 'William Money, I never will enforce the bond against you,' that would not bring it within these cases. It might be, if all statutable requisites, so far as there are statutable requisites, had been complied with, that it would have been a very good contract, whereby she might have bound herself not to enforce the payment. That, however, is not the way in which it is put here; in short, it could not have been, because it must have been a contract reduced into

clusion, Lord Brougham substantially concurred, notwithstanding his former approval of the whole of Lord Cottenham's reasoning in *Hammersley v. De Biel*. But upon this branch of the case, Lord St. Leonards argued at length, upon principle and authority, that Mrs. Jordan was bound by her representations of her intentions, upon the faith of which the marriage was contracted. He said: "I think it is utterly immaterial whether it is a misrepresentation of a fact, as it actually existed, or a misrepresentation of an intention to do or to abstain from doing an act, which would lead to the damage of the party, whom you thereby induced to deal in marriage, or in purchase, or in any thing of that sort, upon the faith of that representation." And he concluded his argument by saying: "Having promised that she would not enforce it, she is in my opinion bound by that promise. The statute of frauds does not extend to this case."

§ 755. Apparently the decision of the House of Lords in this case has not been regarded by the profession in England, as entirely conclusive upon the effect of a representation of an intention; for we continue to find the reasoning of the majority in *Hammersley v. De Biel* repeated in the arguments of counsel, the judgments of the courts,

writing and signed; but that is not the way in which this case is put; it is put entirely upon the ground of representation. Now, my lords, I think that the not adhering to this statement, call it contract or call it representation, is no more a fraud than it would be not adhering to her engagement, if she had said: 'Mr. William Money, you may marry; do not be in fear, you will not be in want; I promise to settle 10,000*l.* Consols upon you.' If she does not perform that promise, she is guilty of a breach of a contract, in respect of which she may be sued, if it is put into a valid form, but not otherwise; so if she had said, as she did, to William Money, 'I mean to give you every thing I am worth in the world, I promise to do so,' her not doing so is no fraud, in the sense in which these cases speak of fraud; it is no misrepresentation of a fact, which the party is afterwards held bound to make good as true. It seems to me that the distinction is founded upon perfectly good sense; and that in truth in the case of what is something future, there is no reason for the application of the rule, because the parties have only to say, 'Enter into a contract,' and then all difficulty is removed."

and the elementary treatises. Indeed it has been intimated that in *Jorden v. Money*, the weight of authority was with the distinguished judges who were overruled, notwithstanding their superior number, and at least equal reputation.⁽ⁿ⁾ But the ruling in that case was followed by

(n) Mr. Peachey in his Treatise on Marriage Settlements, page 74, remarks of this case: "It however detracts somewhat from the intrinsic value of this, the decision of the Supreme Court of Appeal of the three kingdoms, that it is disapproved of by three equity judges of eminence, Lord St. Leonards, the Lord Justice Knight Bruce, and Sir John Romilly." And in delivering his opinion in *Pulsford v. Richards*, 17 Beavan, 94, A. D. 1853, Sir John Romilly reiterated his conviction of the correctness of his conclusions in *Jorden v. Money*. But in the subsequent case of *Goldicutt v. Townsend*, 28 Beavan, 445, A. D. 1860 (§ 733, ante). after saying that he should follow the decision of the House of Lords in *Jorden v. Money*, if the case before him had called for the application of the principle there established, he referred to *Hammersley v. De Biel* as follows: "All which that and similar cases establish is this; that if, in consideration of a promise made by the father of one of the parties to the marriage contract, the other party to it does an act previously to the marriage, which is binding on him, the court holds that to be a good consideration, and that the promise may be enforced." See also his observations in *Bold v. Hutchinson*, 20 Beavan, 250, A. D. 1855, (S. C., 1 Jurist, N. S., 365; 24 Law Journal, N. S., Chancery, 285,) affirmed by the chancellor on another ground, 5 De Gex, Macnaghten and Gordon, 558; 2 Jurist, N. S., 97; and 25 Law Journal, Chancery, N. S., 598. But in *Prole v. Soady*, 2 Giffard, 1, A. D. 1859, (S. C., 29 Law Journal, N. S., Chancery, 721, 5 Jurist, N. S., 1382,) Vice Chancellor Sir John Stuart declared unequivocally his approval of the reasoning of Lord Cottenham in *Hammersley v. De Biel*, upon the effect of a representation of an intention. It was a bill by the children of a marriage, whose mother had died, against the devisees and personal representatives of their maternal grandfather, to enforce a representation, respecting the settlement of certain property upon the plaintiff's mother, alleged to have been made by the grandfather to the plaintiff's father, on the faith of which the marriage was contracted. As we understand the Vice Chancellor, he concluded, upon the evidence, that the representation was to the effect that the property had actually been settled; but he said several times in his opinion, that the representation of an intention to settle would have entitled the plaintiffs to relief. Referring to *Hammersley v. De Biel*, he remarked that in that case the representation was merely the expression of an intention to leave the sum of 10,000*l.* by a revocable instrument; but inasmuch as the expression was an inducement to the contract, the executors were compelled to fulfil that which was expressed as a mere intention. He added: "This doctrine, which gives all the force of a

Lord Cranworth, and apparently also by the House of Lords, in the next case when the question was presented.

§ 756. This was *Caton v. Caton*, first heard before Vice Chancellor Sir John Stuart, A. D. 1865; whose judgment in favor of the plaintiff is reported in 34 Law Journal, New

binding contract, to the mere expression of an intention to do something by an instrument revocable in its nature, is too firmly established to be shaken." Again in *Loffus v. Maw*, 3 Giffard, 592, A. D. 1862 (S. C., 6 Law Times, N. S., 346; 32 Law Journal, N. S., Chancery, 49; 8 Jurist, N. S., 607; 10 Weekly Reporter, 513,) where the plaintiff was induced to reside with her uncle, the defendant's testator, as his housekeeper, upon his verbal representation that he would leave her certain property by his will; and he prepared and executed a will accordingly, but subsequently revoked it; Vice Chancellor Stuart, on pronouncing a decree for the plaintiff, said that although the decision in *Jorden v. Money* was no doubt binding, it could not be considered as a reversal of *Hammersley v. De Biel*; and the proposition attributed to Lord Cranworth, that a statement or representation of what a person intends to do is not sufficient, seems to be irreconcilable with the decision in the latter case, and with the law as laid down by all judges of the highest authority. He also alluded to the fact that *Hammersley v. De Biel* is not referred to in the remarks of any of the law lords in *Jorden v. Money*. In *Walford v. Gray*, 11 Jurist, N. S., 106, A. D. 1865, (S. C., 11 Law Times, N. S., 620; 13 Weekly Reporter, 335;) the same Vice Chancellor again followed *Hammersley v. De Biel*, but under circumstances where no question arose as to the effect of a verbal representation. There, upon a treaty of marriage, the father of the intended wife assured the intended husband, that he and his wife "do not propose to exercise," certain powers of appointment reserved to them by their own marriage settlement, in default of the exercise of which, the intended wife and her issue would be entitled, upon the decease of both her parents, to one third of the property settled. The wife having died, leaving the plaintiff the only issue of the marriage, the Vice Chancellor held that this was a "representation" which entitled the plaintiff, after the death of his grandfather and grandmother, to maintain an action to recover the one third of the settled property, which had been otherwise disposed of by their appointment. But here there was a letter from the grandfather's solicitor, which sufficiently proved the assurance; and principally on that ground, treating the transaction throughout as an "agreement," the Chancellor (Lord Westbury) affirmed the Vice Chancellor's decree, 11 Jurist, N. S., 473; 13 Weekly Reporter, 761; 12 Law Times, N. S., 437. The judgments of the same Vice Chancellor in *Caton v. Caton* and *Williams v. Williams* are mentioned in the following pages.

altogether, and, as she alleged, he promised, if she would forego its execution, "that he would most strictly and faithfully carry out the terms of the marriage contract agreed upon, and would leave to her by his will the whole of her then and after acquired property," etc., according to the provisions of the proposed settlement. She consented, and the marriage accordingly took place in 1853. Before the ceremony, Mr. Caton produced a will, which appeared to be in conformity with his promises; and he executed it in the vestry, immediately after the ceremony had been performed. After the marriage, he took possession of his wife's property; and allowed her the 80*l.* per annum. In January, 1864, he died, and it was then found that in May, 1863, he had executed another will, without the plaintiff's knowledge, revoking all prior wills, and making such disposition of his estate, that she had only the income for her life, of a portion of the personal property belonging to her at the time of her marriage; and the remainder, together with the principal of that part, to the income of which she was entitled by the will, was left to the defendants, his sons by a former marriage, who were also made his general devisees and legatees. Mrs. Caton thereupon filed this bill to enforce the agreement; and the defendants having denied the agreement, and pleaded the statute of frauds, the cause came on for hearing before Vice Chancellor Stuart, who made a decree in her favor.^(s)

§ 757. The defendants appealed from the Vice Chancellor's decree to the Chancellor, (Lord Cranworth), who re-

^(s) His Honor said that the memorandum was not the agreement which the plaintiff asked to have performed, but the relief sought was substantially the same as the specific performance of that agreement; the only difference between the two being the machinery and mode by which the plaintiff's fortune was to be secured to her. And upon the question, relating to the application of the statute of frauds, he thought that the decisions, holding that part performance of a verbal contract for the sale of land would take it out of the statute, were applicable to this case. That here there was evidence in writing; a will was executed; this was more than part performance, it was performance; and all that was necessary was that the will should remain unaltered.

versed it. In delivering his judgment, he said that courts of equity were as much bound by the statute of frauds as courts of law, "unless there be equitable grounds for taking a case out of the operation of the statute;" that this was not denied by the plaintiff; but her counsel insisted that there were equitable grounds for relief, notwithstanding the statute; and this was the ground upon which the Vice Chancellor proceeded. "That marriage itself," continued his Lordship, "is no part performance within the rule of equity, is certain. Marriage is necessary in order to bring a case within the statute; and to hold that it also takes a case without the statute, would be a palpable absurdity." And his Lordship thought that the additional ground upon which the Vice Chancellor rested his judgment; namely, that a will had been prepared previously to the marriage, and executed afterwards, in conformity with the verbal agreement, did not bring the case within the equitable rule respecting part performance. For that rule requires that one of the parties should have been induced, or allowed by the other, to alter his position, upon the faith of the contract; so that it would be a fraud in the other party to set up its legal invalidity. But here the preparation and execution of the will caused no alteration in the plaintiff's position; and no consequence can be attributed to acts of part performance by the party sought to be charged. The circumstances relied upon might afford strong evidence of the existence of the parol contract insisted on, if that was a matter into which the court was at liberty to inquire; but it could not have the effect to give legal validity to a contract otherwise invalid. And the nature of the alleged agreement was such, as hardly to admit of part performance, even by the party to be charged; for, as a will is always revocable, a contract to make a bequest, even when a will has been prepared and executed accordingly, is a contract of a negative nature, a contract not to vary it. And his Lordship thought that there could be no part performance of a contract of that character.

§ 758. Upon the argument of the appeal from this decree to the House of Lords, the plaintiff's counsel abandoned the point that there had been such part performance of the verbal agreement, as would take it out of the statute; and they insisted that, although the execution of a settlement had been abandoned by consent, the original agreement had never been abandoned, and they had a right to rely upon that. This agreement, it was argued, was evidenced by the memorandum, which was sufficiently signed to satisfy the statute. And the outline of the argument in the Law Reports indicates that they also suggested that she was entitled to relief, in consequence of having married in reliance upon the defendant's representation; within the reasoning of Lord Cottenham, in *Hammersley v. De Biel*. But, apparently, this point was not much pressed; and the court disregarded it altogether. In the speeches delivered by the law lords, the discussion was confined to the other points; and, with the exception of a general approval of the judgment of the Chancellor by Lord Chelmsford, (his successor), and by Lord Westbury, and a remark of Lord Cranworth, to the effect that nothing had occurred to change the opinion expressed by him in the court below, they contain no reference to the question now under examination.

§ 759. But Vice Chancellor Sir John Stuart, in the latest case of this series, *Williams v. Williams*, 37 Law Journal, New Series, Chancery 854, A. D. 1868, (t) again went back to Lord Cottenham's doctrine respecting a representation. This was an appeal from the decision of the judge of a county court, made upon the accounting of the executors of the will of one Evan Williams. Richard Williams, one of the executors, and a son of the testator, claimed to retain 150*l.*, part of a sum of 200*l.*, as the balance of his marriage portion. It appeared that the testator previously to and in consideration of the marriage of Richard, had verbally promised him the portion of 200*l.*, and had also verbally

(t) S. C., 18 Law Times, N. S., 785.

at a future day, if it can be distinguished from a contract, does not, in the absence of actual fraud, entitle the party to whom it was made, to maintain an equitable action for specific performance; although it was made for the purpose of so being acted upon by him; and although it has so influenced his conduct that a restoration to his former condition would be impossible. On the contrary, in order to enable such an action to be maintained, the representation must have been, in legal effect, a contract, and the plaintiff must found his action upon it as a contract. But when the contract was made in consideration of marriage, the statute prevents the courts from granting any relief, founded upon the performance of that consideration. Consequently a representation of an intention, made for the purpose of inducing a marriage, will not sustain a bill for specific performance, unless the evidence thereof is contained in a writing sufficient to satisfy the requirements of the statute of frauds; or unless the plaintiff, or the person through whom he derives his right of action, has, in addition to the celebration of the marriage, done some distinct act, sufficient of itself to entitle him to relief; his performance of which was contemplated by the express terms of the representation itself, or by necessary implication therefrom.

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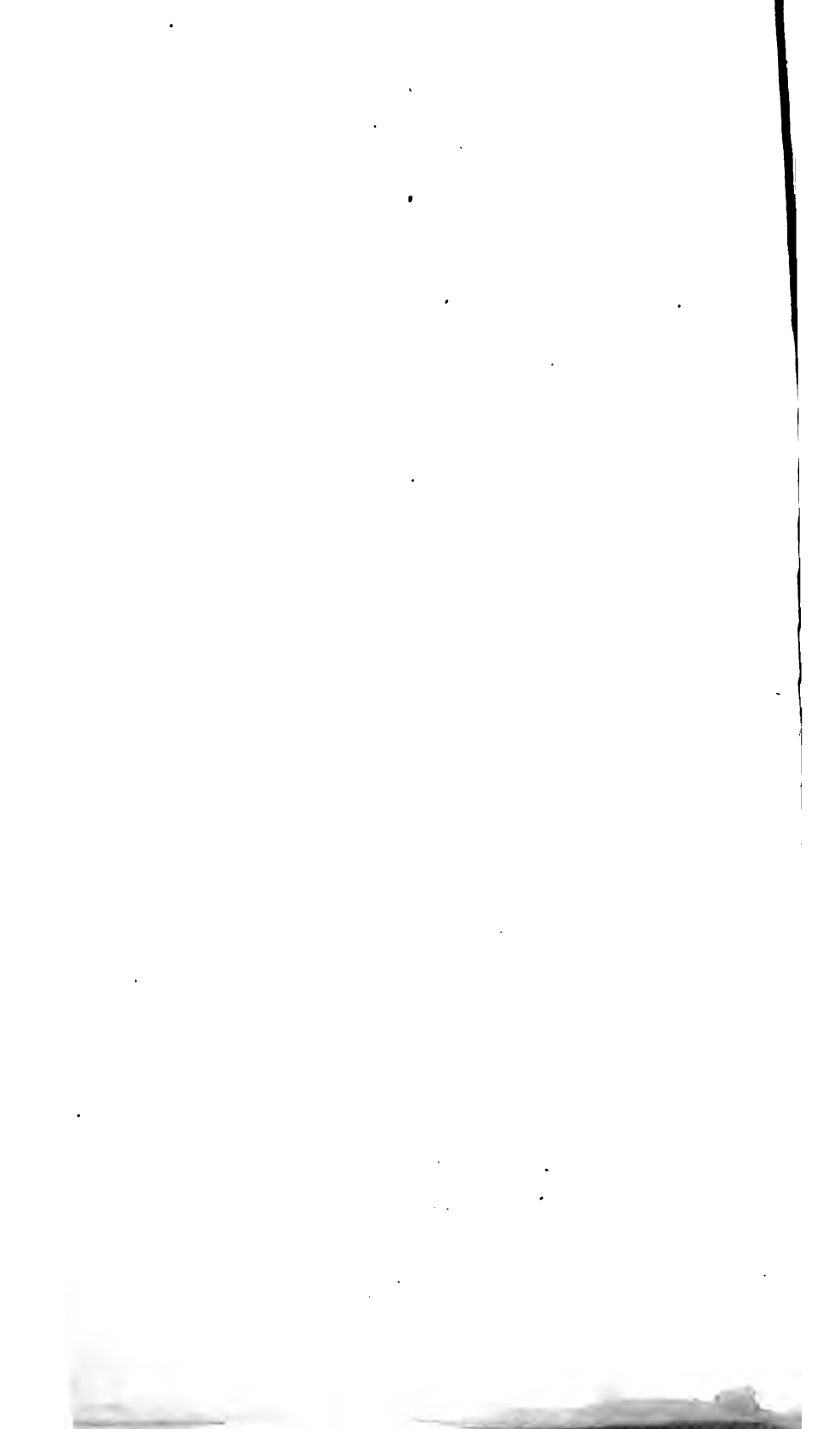
WARRANTY:

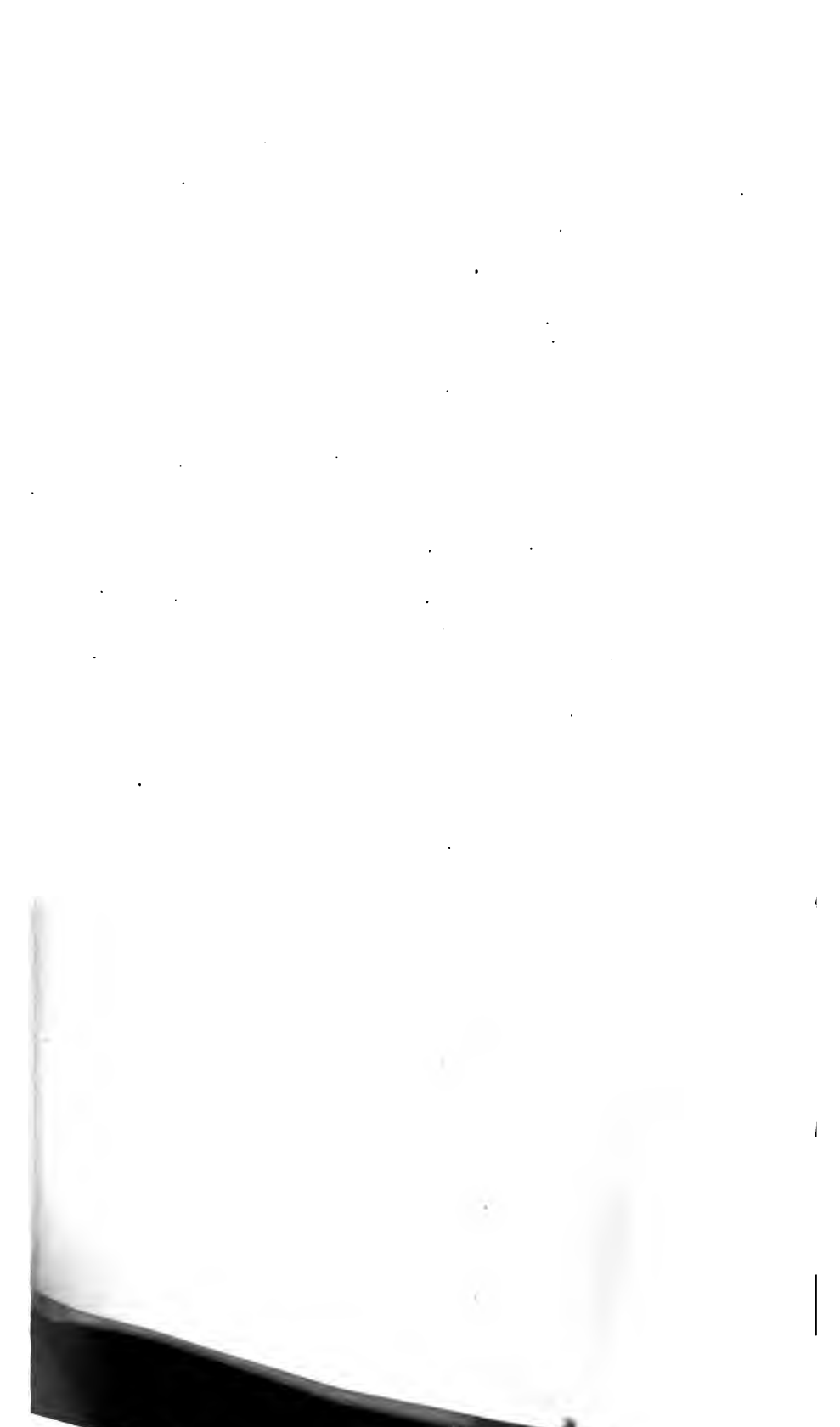
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